CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF MISSOURI.

OCTOBER TERM, 1874, AT ST. LOUIS.

JOSEPH C. BETHEL, Defendant in Error, *vs.* A. T. FRANKLIN, *et al.*, Plaintiffs in Error.

1. *Partnership—Note given outgoing partner for assets—Suit on in action at law, when proper.*—Where one of two co-partners buys the notes and accounts of the firm at their face value and gives the co-partner his note for the amount with the understanding that where the notes and accounts prove worthless, a rebate *pro tanto* should be made on the purchase note, *held*, that in suit on the note in an action at law, defendant might, where these assets prove valueless, set up the facts to that extent as a defense to the note. No resort would be necessary in the first instance to a bill in equity for the purpose of settling the partnership. (See Russell vs. Grimes, 46 Mo., 410.)

Error to Montgomery Circuit Court.

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Error to Montgomery Circuit Court.

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I. In Russell vs. Grimes, (46 Mo., 410,) suit had been brought for settlement of partnership accounts; referees had reported the amount due the firm, and division had been made of the assets between the partners; being a complete settlement by a court of competent jurisdiction.

Taking the amended answer of defendant to be true, they hold a demand against the partnership firm, which can be adjusted only by a suit in chancery for a settlement between the partners. (Bond vs. Bemis, 55 Mo., 524; Finney vs. Turner, 10 Mo., 208; Field vs. Oliver, 43 Mo., 200; McPherson vs. Week, 30 Mo., 345; Lamb vs. Brolaski, 38 Mo., 51.)

Vories, Judge, delivered the opinion of the court.

This action was brought in the Montgomery Circuit Court, in the year 1871, to recover the amount due on a promissory note charged to have been executed by the defendants to the plaintiff for the sum of four hundred dollars, bearing date the first day of October, 1860, and payable eleven months after date, with ten per cent. interest after the first day of March, 1861.

The defendants appeared to the action and filed an answer to the petition, in which they admitted the execution of the note, and set up matters in avoidance of the action.

The plaintiff demurred to the answer, on the ground that it set up no defense to the action, setting forth in detail the special grounds of demurrer.

The court sustained the demurrer, and the defendants failing to further plead in the action, final judgment was rendered in favor of the plaintiff for the amount named in the note sued on, with interest. The defendants in due time filed their several motions for a new trial and in arrest of the judgment, which being severally overruled by the court, the defendants filed their several exceptions, and have brought the case to this court by writ of error.

The only question presented to this court is, whether the answer of the defendants constituted any defense to the plaintiff's action. If it did, then the demurrer to the answer was

improperly sustained and judgment improperly rendered for the plaintiff.

The answer of the defendants is a long one, and is rather confused in its statements, but after the admission of the execution of the note sued on, the answer sets up substantially the following facts in defense: That at the time of and immediately before the execution of the note sued on, the plaintiff and the defendants, Franklin and Clanton, were equal partners in the business of buying and selling goods; that previous to the formation of said partnership, plaintiff and defendant Franklin had been equal partners in said business; that, at the time of the formation of the partnership between plaintiff and the defendants, Franklin and Clanton, the firm composed of plaintiff and defendant Franklin, were the owners of notes and accounts amounting to the aggregate sum of $800, which were, at the time of the entering into the partnership between plaintiff and defendants, Franklin and Clanton, transferred and turned over to the last named firm for collection; that after the firm composed of plaintiff, Franklin and Clanton had been in business for a time, to-wit: on the 1st day of October, 1860, the plaintiff proposed to sell out his interest in the firm and business to defendants Franklin and Clanton, exhibiting to them at the time a statement of the liabilities and assets of the firm, except the goods and merchandise then on hand, and also a list showing the balance due and uncollected on the notes and accounts transferred to said firm by the firm of Bethel and Franklin as aforesaid; the plaintiff then requesting that an invoice should be taken of the goods then on hand, which was taken and made out by the parties, and which amounted to the sum of $1,800; that the notes and accounts of indebtedness belonging to said firm, as per the statement made of them, also amounted to the sum of $1,800; that the uncollected notes and accounts assigned to said firm by the firm of Bethel and Franklin as aforesaid, amounted to the sum of $466.66, and that the liabilities of said firm amounted to the sum of $2.800; that after the invoice of the goods was made, as aforesaid, by

and between plaintiff and defendants, Franklin and Clanton, it was agreed between all the parties that they would dissolve their partnership and that plaintiff would sell his entire interest in said partnership and the effects thereof to defendants, Franklin and Clanton, and said defendants agreed to purchase the same, on the terms following, to-wit: that the said Franklin and Clanton should assume and pay debts of the firm to the full amount of the invoice value of the goods and merchandise, that is to say, $1,800, and said goods should be transferred to them, and that the notes and accounts belonging to said firm should also be transferred to said defendants, Franklin and Clanton, also amounting to $1,800, and that the money collected thereon should be applied to the payment of the balance of the indebtedness of said firm, or a sufficiency thereof for that purpose, said balance of said indebtedness being $1,000; that said defendants should pay plaintiff $100 in cash, as a part of the plaintiff's one-third share of the excess of assets over the liabilities of said firm, amounting in all to $800, and should also give and execute to plaintiff a note, with defendant, Nunnelly, as surety thereon, for the sum of $400 for the balance of plaintiff's share of said excess and his share of the notes and accounts which were uncollected, and which had been assigned to said firm as before stated, which said note for $400 was then executed and delivered to plaintiff, and is the same note sued on; that as a part of said contract and agreement, it was agreed that the defendant, Franklin, should have the right to the use of the money collected on said assigned notes and accounts assigned by Franklin and Bethel aforesaid in payment of any debts due by the firm of Bethel & Franklin, and that one-half of the amount so paid should be credited on the note sued on, and that one-half of all debts so assigned as aforesaid which should prove to be worthless and not collectable, should also be credited upon the note sued on, and that one-third part of the amount of the notes and accounts of the said firm of plaintiff, Franklin & Clanton, in excess of the liabilities of said firm that should prove to be unavailable, should also be entered as a credit on said note.

The defendants then aver that in pursuance of said agreement the said goods and merchandise were transferred to defendants, Franklin & Clanton, and that they assumed and paid $1,800 of the debts of said firm, and that they paid plaintiff the said sum of one hundred dollars in cash, and executed to plaintiff the note sued on with defendant Nunnelly as surety thereon, and that said notes and accounts as per said agreement, were assigned and transferred to them; that all of the money collected on said notes and accounts of the firm was applied by them to the payment of said balance of the said liabilities; and defendants aver that there was not a sufficient amount collected, or which could be collected on said notes and accounts, to pay said balance, and that the amount of $1,000 of said notes and accounts was unavailable; that immediately after the execution of the note sued on and the assignment of said notes and accounts of said firm to said Franklin and Clanton, the plaintiff collected and appropriated to his own use one of the said firm's accounts so assigned to them, that is to say, one account against one G. Nunnelly for the sum of $160; that the greater part of the balance of said notes and accounts so assigned to the firm by said Franklin and Bethel, amounting to the sum of $300, were and are unavailable, and that the sum of $166.66, collected by them on the same, was used and applied by said Franklin in payment of the liabilities of the firm of Franklin & Bethel. The defendant's therefore say that by reason of the premises aforesaid, the consideration for said note to plaintiff sued on has wholly failed, and they do not owe the amount thereof, or any part thereof, wherefore they pray judgment, etc.

It is contended by the plaintiff that the court properly sustained the demurrer to the defendant's answer, on the ground that the defendants, by their answer, ask to open up the settlement of a partnership account, and then to settle the partnership accounts in an action at law brought by one partner against the other partners, which cannot be done in an action at law, but can only be done by a bill in the nature of a bill in equity to settle the whole partnership business.

This, I think, is a misconception of the nature of the defense attempted to be set up in the answer. If the averments in the answer are true, the partnership which had existed between the plaintiff and two of the defendants had been entirely settled at the time of the execution of the note sued on; the plaintiff had transferred his entire interest in the business and the partnership effects of every description to his co-partners, who are the defendants, Franklin and Clanton, after which of course he ceased to be a partner or to have any further interest in the partnership effects. The co-partners of plaintiff had taken the notes and accounts of the firm at their nominal value, and executed the note sued on as a part of the consideration to be paid by them for the interest of plaintiff in the partnership effects, the plaintiff agreeing with his co-partners that if any of these notes and accounts of the firm thus transferred to Franklin and Clanton turned out to be insolvent or worthless, one-third of such amount should be rebated from the note sued on, and that one-half of any debts of the old firm of Franklin & Bethel which should be paid by Franklin out of the moneys collected on the notes and accounts assigned should also be credited upon, or rebated from the amount of the note sued on.

It will be seen that by this arrangement plaintiff retained no legal title to any part of the effects of the firm of which he had been a partner. His interest in the notes and accounts was only such an interest as a vendor of a horse would have in the horse sold, where he had given a warranty as to his soundness or qualities. The answer further charges that one of the accounts which had been turned over to Franklin & Clanton, as a part of the consideration of the note sued on, had been collected by plaintiff, and the money thus collected, amounting to $160, converted to the plaintiff's own use. Surely the consideration of the note has failed to that extent, if that charge be true. It seems to me that although the answer was not concisely drawn, the defense, as stated therein, comes exactly within the principle enunciated by this court in the case of Russell vs. Grimes, (46 Mo., 410). And if the

principals in the note could set up this defense to the note as to them, the same defense could, of course, be good as to their surety. The court, therefore, erred in sustaining the demurrer to the answer, and in rendering judgment thereon for the plaintiff.

The judgment will be reversed and remanded to the Circuit Court, where the plaintiff can withdraw his demurrer and reply to the answer, and the case proceed to trial. Judge Lewis, being of counsel in the case, did not sit; the other judges concur.

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MARY L. TYLER, Appellant, *vs.* WM. WELLS, *et al.*, Respondents.

1. *Ejectment—Labeaume survey and patent of 1852 prevailed over Lirette confirmation and survey of 1826—Brazeau reservation—Magwire vs. Tyler, referred to.*—In ejectment for certain land in St. Louis, plaintiff's claim was based originally on a confirmation made in 1810 to Labeaume, "according to the Soulard survey in 1799." The first survey of the tract did not include the land in dispute. But it was set aside and a new survey made retracing the Soulard survey, which embraced that tract, and on this new survey, a patent was issued to Labeaume in 1852. Defendant claimed, by virtue of a confirmation to Lirette of "one by forty arpents" made in 1816 by act of Congress, under which the land in controversy was located by a United States survey in 1826. *Held*, that the Labeaume confirmation being of a definite tract of land, took immediate effect, and that the subsequent proceedings by survey and patent related back to the proceedings before the board in 1810 and prevailed against the confirmation to Lirette. The case of Magwire vs. Tyler originated in a dispute about locality, and in that case the titles of Brazeau & Labeaume were synchronous, and originated before the same board, and the survey locating the Brazeau tract within the Labeaume confirmation, was in that case held correct, but that decision did not determine the last Labeaume survey and patent issued thereon in 1852, to be invalid, except as to the Brazeau reservation.

Appeal from St. Louis Circuit Court.

B. A. Hill, for Appellant.

I. The confirmation to Louis Labeaume of 1810, "is valid against the United States," sec. 4 of Act of March 3, 1807, U. S. Stat. at Large, vol. 2, p. 441. It was a confirmation on actual inhabitation and cultivation on the 1st October, 1800, by Labeaume, U. S. Stat. vol. 2, pp. 324 and 440; and for the specific tract of land described in Soulard's survey of 1799 for Labeaume, on which the confirmation was made. (U. S. Stat. Vol. 2, pp 441–2, §§ 6, 7; West vs. Cochran, 17 How., 412, 413, and in Mitchell vs. Handfield, 33 Mo., 438.)

II. Whenever a confirmation is for a tract of land that can be located with certainty, the title passes by force of the confirmation alone. (Mitchell vs. Handfield, 33 Mo., 438; Landes vs. Brant, 10 How., 348, 370; Ott vs. Soulard, 9 Mo., 581, 600–2; Berthold vs. McDonald, 24 Mo., 126; Harrold vs. Simonds, 9 Mo., 326; Cottle vs. Sydnor, 10 Mo., 763; Landes vs. Perkins, 12 Mo., 238; Greyol vs. Chouteau, 19 Mo., 546; Grignon's lessee vs. Astor, 2 How., 319; Chouteau vs. Eckhart, 2 How. 344; Mackay vs. Dillon, 4 How. 421; LesBois vs. Bramell, *Id.* 449.)

III. The case of Magwire vs. Tyler, (8 Wall., 669) is made to turn on the question of legal title, and of the location of Brazeau's reservation. The court, in its second opinion puts the case simply on the ground that Magwire obtained a title to four by four arpents in the S. E. corner of Labeaume's patent, which was a superior legal title to the elder title of Labeaume. But it does not attempt to pass on the effect of the confirmation to Labeaume outside of the newly created reservation for Brazeau in the S. E. corner of Labeaume's patent. The confirmation to Labeaume therefore stands as valid for all the land outside of the reservation. The confirmation to Lirette in 1812 and 1816 is expressly excluded from operating, so as to affect or impair the confirmation to Labeaume of 1810. (U. S. Stat. at Large. Vol. 2, p. 748–50, 812; Vol. 3, pp. 121, 328, 329.)

The decision in Magwire vs. Tyler, recognizes the distinction between confirmations of tracts of land without ascertained boundaries, and confirmations with ascertained

boundaries. The confirmation to Brazeau was held in West vs. Cochran to be vague and undefined and to pass no title to Brazeau, until survey and patent. But the confirmation to Labeaume was held in West vs. Cochran to be according to Soulard's survey; so also in Mitchell vs. Handfield, its boundaries were ascertained.

Glover & Shepley, for Respondents.

I. The title of the defendants under Lirette, as a pure legal title, is older than the title under the patent to Labeaume. Our title was a perfect legal title on the 29th April, 1816, upon its location by survey of the United States. The title to Labeaume only became a perfect legal title in 1852, as the titles to lands confirmed by the first board were only to become perfect titles upon the issuing of the patent. Therefore, the naked legal title did not pass out of the United States, as to any land confirmed to Labeaume, until the issuing of the patent.

That the title of the United States passed out of it to Lirette's representatives, upon the survey thereof, upon the confirmation by the act of the 29th of April, 1816, both the words of the law and the decisions made upon it conclusively show. It needed no patent. (Aubichon vs. Ames, 17 Mo., 89; Marsh vs. Brooks, 14 How., 513–524.)

II. As the confirmation to Labeaume was a confirmation to be surveyed, and had no certain location, till 1852, (Cochran vs. West, 17 How., 403; Magwire vs. Tyler, 8 Wall., 650.) it was competent for the United States, by a subsequent grant, the location of which was defined by United States survey, made prior to 1852, to pass title to another. (Vasquez vs. Ewing, 42 Mo., 257; Menard vs. Massey, 8 How., 293 (308-9); Ledoux vs. Black, 18 How., 473, at page 475.)

Napton, Judge, delivered the opinion of the court.

This case depends on a single question—the construction to be given to the confirmation of the board of commissioners of Labeaume's claim in 1810.

The plaintiff claims under Labeaume: the defendant under Lirette, who in 1816 had a confirmation to one by forty arpents by act of congress, which confirmed generally the decisions of Recorder Bates. The first survey of the Labeaume tract made by the United States surveyor did not include the Lirette arpent now in dispute.

This survey was made by Jos. C. Brown, and followed the decision of the board in regard to quantity; but the survey was set aside and a new survey made, conforming it to Soulard's survey, and upon this new survey a patent issued to Labeaume in 1852.

There is no dispute that the last survey and the patent thereon cover the land in controversy. The question is, whether the last survey (No. 3,333) is to be understood as a correct survey of the confirmation in 1810. The defendants insist that the confirmation was of 356 arpents, and therefore that the survey of Soulard, which was for 374 arpents, was virtually rejected by the board; whilst it is urged on the other side, that the confirmation was of a tract of land surveyed by Soulard under the directions of Trudeau, and that Soulard's survey was confirmed.

If the court adopts the opinion in Mitchell vs. Handfield, (33 Mo., 431,) and in West vs. Cochran, (17 How., 412) there could be no question on this point. But since the decision of these cases the supreme court of the United States in Magwire vs. Tyler, (8 Wal., 669) it is said have overruled these opinions.

The case of Magwire vs. Tyler is a peculiar one, originating in a dispute about locality, and really involving no question in regard to the construction of the acts of congress of 1805–7, etc., or the acts of the board of commissioners in 1810. The representatives of Brazeau insisted that their land was inside of the land confirmed and surveyed to Labeaume. The departments at Washington at first determined otherwise, and surveyed for Brazeau a tract south of, and outside of the Labeaume survey, and so long as this condition of affairs lasted, the courts here and at Washington recognized the right of the government to locate the Brazeau

reservation. But ultimately the government at Washington recognized Brazeau's claim to be inside of the Labeaume survey and grant, and it was accordingly so surveyed and patented in 1862, and this survey and patent were ultimately held to prevail over the survey and patent to Labeaume, though granted ten years thereafter.

But it will be observed that the titles of Labeaume and Brazeau were synchronous, and originated from the same board of commissioners. The dispute was as to their locality. The Brazeau representatives insisted from the beginning, that their claim was inside of the Labeaume survey, though the government surveyors located it outside and south of the ditch that formed the southern line of Labeaume's tract, and so it was patented to Brazeau's representatives; but they refused to accept the patent and this survey and patent were ultimately set aside, and the Brazeau tract of 4 by 4 arpents was located within the Labeaume tract and a patent issued in conformity to this location, and this title in the case of Magwire vs. Tyler, (18 Wall. 669) was held to be the best one. In the opinion of the court in this case, the Spanish survey of Soulard is criticised—in fact, held to be erroneous, and the patent issued thereon in 1852 is cited to show that it was subject to "valid adverse claims." How far this opinion was intended to affect the title under the confirmation of 1810 is not clear. It is held beyond dispute that this survey of Soulard embraced the Brazeau reservation. Beyond that it was unnecessary to go, and we are not prepared to say that the court meant to overturn the survey and patent *in toto* and force the representatives of Labeaume to prove their lines under Trudeau's grant. In other words, it was not, we think, the intention of the court to declare Soulard's survey and its retracement by the U. S. surveyor a mere nonentity, and place Labeaume's claim on the basis of grants under the acts of 1812, 1815, etc., in which the claimant has nothing to do but to prove his cultivation, possession, etc.

In West vs. Cochran and Mitchell vs. Handfield it was decided otherwise. The claim of Labeaume was considered a

definite one, fixed by a survey, and we do not understand the opinion in Magwire vs. Tyler, as authorizing the deduction that this survey and patent of 1852 were mere nullities.

The claim of Labeaume in 1810 was not to an indefinite tract of land. Judge Catron says in West vs. Cochran (17 How., 412): "In 1810, the board of commissioners confirmed the grant to Labeaume, according to Soulard's survey."

He then proceeds to state the survey and patent to Brazeau, and as the latter was located by the government outside of the Labeaume tract, he held that the court had no power to change it.

In Mitchell vs. Handfield, *supra*, the court observes, Bates, J., delivering the opinion: "In some cases of confirmations and for some purpose the title does not attach to any particular land until the survey is made; but in this case Labeaume's claim before the board of commissioners was accompanied by a concession and Spanish survey, and the confirmation was, therefore, of a definite tract of land, to which the title immediately attached. It was ordered to be surveyed according to the concession, but the survey so ordered could only be a retracing of the lines run by the Spanish surveyor; or even if there had been an error in the Spanish survey, such error might, and probably would have no effect to impair the definiteness of the tract confirmed. If there had been before the commissioners no evidence by which to identify the tract, the confirmation would operate as a grant which, because of vagueness, would attach to no land until it should be located by a United State survey. In this case, the confirmation, being of a definite tract of land, took immediate effect, and the subsequent proceedings, by survey and patent, relate to the time of the inception of the proceedings before the board of confirmation."

These cases decided by the supreme court of the United States and by this court are clearly conclusive of the present, unless they have been overruled by the case of Magwire vs. Tyler, (8 Wall. 669).

But, although there is in this last decision a basis from which such deductions might be drawn, I see nothing in the conclusion reached to justify such an inference. The survey 3,333 and the patent thereon have not been decided as invalid, except so far as the Brazeau reservation is concerned, and the recognition of this Brazeau title does not deny the validity but determines the locality of this reservation within the survey made to Labeaume.

The survey and patent to Labeaume have not been set aside. They date from 1810, and the title under Lirette in 1816 is no defense. If it was the intention of the supreme court in Magwire vs. Tyler to go farther than to sustain the Brazeau claim and destroy the Labeaume title, so far as it depended on surveys and patents, they have not so declared, and we decline to draw such inferences.

The judgment of the Circuit Court must therefore be reversed and the cause remanded.

THOMAS WANNELL, Appellant, *vs.* SAMUEL KEM, *et al.*, Respondents.

1. *Practice, civil—Evidence—Juries.*—In civil cases at law juries are the sole judges of the preponderance of testimony.
2. *Married woman—Conveyance of—Notary's certificate—Statutory requirements touching explanation and examination, etc., imperative.*—In suit upon a mortgage given by a married woman upon her real estate, the certificate to her acknowledgment is not conclusive; and where she testifies that she was not by the notary made acquainted with the contents of the deed, nor examined apart from her husband, nor asked if she executed it voluntarily, it is improper to show her knowledge of the deed prior and subsequent to her examination, and, that, in point of fact, she was not influenced by compulsion or improper means by her husband. The statutory requirements touching such examination and information by the notary are imperative, and must be complied with as a necessary pre-requisite to a valid conveyance of her property.
3. *Vendors—Misrepresentations of as to property sold—Negligence of vendee in making inquiries, may be set up by vendor, when—Estoppel.*—In suit upon a promissory note given for the purchase of certain stock, it appeared that defendant purchased the same from the president of the company, who represented

that the stock was at par, that the business was of great value, and that the corporation was solvent, all which representations proved untrue. It further appeared that defendant, before his purchase, had ample opportunities to learn the true state of affairs. But, *held*, that defendant had a right to presume that the vendor, as president of the company, was fully informed as to its financial condition, and the failure of the vendee to make inquiries relating thereto in other quarters was no proof of negligence such as would estop him from pleading the false representations as a bar to recovery on the note.

4. *Vendor—Fraudulent misrepresentations—What sufficient to defeat claim for purchase money.*—Fraudulent misrepresentations in order to defeat a recovery of purchase money for the property sold, must be made with intent to deceive and must be solely and exclusively relied upon by the vendee in making his purchase.

5. *Fraudulent misrepresentations—Negligence of vendee—Plea of—Parties must be on equal footing.*—Generally, where the courts have refused to uphold the defense of fraudulent misrepresentations of the vendor, basing the refusal on negligence of the vendee in ascertaining the facts, the case referred to sales of land, and both parties had equal opportunities of information. When vendor and vendee do not occupy an equal footing in this respect, the plea of negligence will not avail.

Appeal from Louisiana Court of Common Pleas.

Henry D. Laughlin, for Appellant.

I. The instructions put the case to the jury on the theory that Kem had the right to rely solely upon Brolaski's representations, whether other means of information were at his disposal or not; and that it was only necessary for the jury to believe that he did so rely, to entitle him to a verdict. This is not the law. (Langdon vs. Green, 49 Mo., 363; Holland vs. Anderson, 38 Mo., 56; Bryan vs. Hitchcock, 43 Mo., 527; McFarland vs. Carver, 34 Mo., 195; Fish vs. Cleland, 33 Ill., 238; Miller vs. Young's adm'r, 33 Ill., 355; Mitchell vs. Deeds, 49 Ill., 416; Miller vs. Craig, 46 Ill., 109; Eames vs. Morgan, 37 Ill., 260; Belden vs. Henriguez, 8 Cal., 89; Barton vs. Simmons, 14 Ind., 49; Wagn. Stat., 1021, § 49.)

Fagg & Dyer, for Respondents.

Napton, Judge, delivered the opinion of the court.

This was an action on a note for $8,000, given in consideration of 160 shares of stock in the "Mo. Gas Works Building

Co.," signed by defendant Kem and his wife, and secured by a deed of trust on Mrs. Kem's land in Pike county.

The defense was, that Brolaski, the vendor of the stock, to whom the note and mortgage were given, had made false and fraudulent representations in regard to its value, and the condition of the company; that the purchaser relied solely on these representations, and that the stock was really of no value, and therefore, the note was without consideration.

On the part of Mrs. Kem the additional plea was made, that the acknowledgment of the deed on her part was not made according to law; that there was no privy examination of her, separate and apart, from her husband, and that the contents of the deed were not explained to her by the notary.

These issues were tried by a jury, and a verdict rendered on each for the defendants. The propriety of the judgment based on this verdict is denied in this court on two grounds only; one, that the court excluded testimony offered which ought to have been admitted, and admitted testimony which ought to have been excluded; the other, that the instructions of the court to the jury were erroneous.

So far as Mrs. Kem is concerned, her testimony was clear, that her husband was present during her examination by the notary, and that the notary gave no explanation or information to her of the contents of the deed she signed. The notary, however, testified precisely to the contrary, that she was examined separate and apart from her husband, and that he explained to her the purport of the deed. There is no possibility of reconciling these conflicting statements, and it was a simple question of credibility with the jury, and the verdict of the jury cannot be disturbed here on this point.

But there were various questions propounded to Mrs. Kem on her cross-examination, which were excluded by the court, and the exclusion of these questions is properly a matter for our consideration. These questions were as follows: 1. Did you know at the time you signed this deed (showing the mortgage deed to witness) what it contained? 2. Had you ever seen the mortgage before the notary came to your house

to take the acknowledgment? 3. Had you ever read the mortgage before the notary came to your house? 4. Did you know for what purpose you executed the paper, before your acknowledgment was taken? 5. Did you know for what purpose the notary came? 6. I will now ask you if the paper (the mortgage) was your voluntary act and deed for the uses and purposes mentioned in it, and did you not execute it for those uses and purposes freely, without fear, without compulsion, and without any undue influence on the part of your husband? 7. Did you not see the mortgage, after the acknowledgment was taken, in the possession of your husband, and did you not know that he intended to take it to St. Louis and did take it there to deliver to Brolaski to secure him on the payment of the note? 8. Did you not execute this deed voluntarily? These questions were all excluded by the court, and Mrs. Kem was not allowed to answer them or any of them. Exceptions were taken to this ruling.

Our statute laws point out and direct the mode, and the only mode, in which a married woman can convey her lands, and particularly specifies the duty of the court or officer before whom the acknowledgment is taken, and the character of the certificate to such acknowledgment. This certificate must substantially conform to the requirements of the statute, and the facts certified to must of course be true and not false. The certificate, if substantially in compliance with the law, is sufficient evidence of the wife's acknowledgment, but it is not conclusive, and may be shown on a proper issue to be false.

In this case the wife testified to the falsity of the certificate in two material particulars, one of which was, that there was no privy examination by the notary at all; and another was that she was not made acquainted by the notary with the contents of the deed; and she further declared that she was not asked if she executed the deed voluntarily and without compulsion or undue influence of her husband. The questions propounded to her, and which the court excluded, were designed to show her knowledge of the deed, previous to her examination, and subsequent to it, and that in point of fact,

she was not at all influenced by any compulsion or improper means by her husband.

We think these questions were properly excluded. The legislature has required, for good reasons, a privy examination, and an explanation on such privy examination of the contents or purport of the deed. The courts have no power to say that those things in a particular case were unnecessary, on the ground that the facts in such case were, that there was no compulsion, and the wife was really entirely familiar with the deed, and executed it without the slightest improper influence from her husband.

The object of our statute is to prevent imposition on the wife in the disposition of her lands, and, therefore, it is not intended to leave it in the power of the husband to explain to his wife the object and purport of the deed, but to require a disinterested officer or court to make to her whatever explanation is necessary, and to ascertain her willingness to sign the deed. If a previous examination by the wife, of a deed which she is called upon to acknowledge, is all that is necessary, it would be in the power of an unscrupulous husband to procure her acknowledgment to a different deed from the one previously explained to her, in case the signature is made first in the presence of the notary, and in cases where she had signed before seeing the notary, it would be also in the power of the husband to misrepresent to her the object and effect of the deed.

To prevent any such imposition on the wife, it was therefore provided, that a specified officer or court should examine the wife, separate and apart from her husband, and on such examination should explain to her the object of the instrument proposed to be acknowledged, and should ascertain in this way, that the wife was not unduly influenced by her husband, and certify to those facts in his certificate of acknowledgment.

The history of this case shows how this question arose and, perhaps, even explains the finding of the jury under the instructions of the court. The original certificate of acknowl-

edgment, in this case, was simply one of the ordinary character of acknowledgment, where the party was not a married woman. Nothing whatever was stated in regard to a privy examination; nothing relative to an explanation of the deed; nothing in regard to the absence of undue influence. This was so obviously defective, so far as the wife's estate is concerned, that a bill was filed to get a decree or order from the Circuit Court in the exercise of its equitable power to procure a correction of the certificate. This court, however, on a review of this case, decided that the courts had no power over such mistakes, but intimated that the notary—the officer who took the acknowledgment—might correct the certificate, if, in point of fact, this privy examination, explanation, etc., had been made. (Wannell vs. Kem, 51 Mo., 150.) The subsequent certificate which the notary substituted for the original one which he erased, was accordingly, long after the acknowledgment, appended to the deed, conforming exactly to the requirements of the statute in regard to passing the estate of a married woman.

If we assume this last certificate as true, and stating the facts as they occurred, it is plain that the notary, at the date of his examination and certificate, was perfectly aware of what was required by the statute, and it is remarkably strange that his first certificate, given at the very time when all these transactions occurred, should have omitted all notice of them entirely.

Errors might have been committed in point of form, or even mistakes in point of law; but how the notary, after having made a privy examination, and learned the total absence of influence on the wife, or having given an explanation to her of the contents of the deed, should have totally omitted all mention, or attempt to mention, however imperfectly, any of these things which the notary knew were necessary, (or he would not have made them) is, to say the least, difficult to account for, and it is not surprising under these circumstances, that the jury found for the defendant, Mrs. Kem.

However this may be, the verdict in this case was for Mrs. Kem, and under proper instructions on this point, as will be seen upon an examination of them as hereinafter copied, and cannot therefore be disturbed; and this verdict and judgment in truth renders the deed of mortgage void as to the husband as well as the wife. (Wagn. Stat., p. 935, § 14; Wannell vs. Kem, 51 Mo., 152.) But as the plaintiff has a right to a reversal of the judgment, so far as the note is concerned, if the instructions were erroneous, it is still necessary to examine the propriety of the instructions.

The defendant, Kem, purchased the stock, for which this note was given, from Brolaski, who was the president of the "Mo. Gas Works Building Co.," and set up in his answer, that he was induced to buy the stock, entirely relying on the statements of said Brolaski, in regard to the condition of the company, the value of its assets, the amount of its liabilities, the value of the stock, the quality of the gas proposed to be made, and its cost, and that on all these points and others, he was fraudulently and knowingly deceived by the statements and representations of said Brolaski. This was denied in the replication, and the main, and indeed only point at issue, so far as Kem was concerned, was, whether such representations were in fact made, and whether they were of such a character as to avoid the sale.

The evidence in this case occupies over one hundred and fifty pages of closely written manuscript in the bill of exceptions, and even a condensed statement of it would throw no light upon the points of law raised by the instructions. It was a purchase of stock in this Gas Light Company and the vendor was president of the company. The vendor, it is alleged, represented to Kem that the stock was at par, that the company owned what is called the "Dean's Patent," for manufacturing gas from petroleum instead of coal; that such gas was greatly superior in brilliancy and greatly cheaper in production than the ordinary gas made from coal; that in fact, it could be made at half the price of gas made from the best Pittsburg coal; and that the company was solvent. These

representations were attempted to be proved fraudulent and untrue, and made for purposes of deception. The stock proved to be valueless, yet the defendant, allured by these representations of Brolaski, made the purchase, was elected president of the company in place of Brolaski, and occupied that position for seven months.

There was evidence on the other hand to show that the defendant, Kem, repeatedly visited St. Louis, with a view to this purchase; that he had ample opportunities of acquainting himself with the probabilities of the success of this speculation; that he finally accepted a written proposal of Brolaski, was elected president of the company, at a salary of $2,000 per annum, and visited various parts of the State for the purpose of getting contracts to put up works on this "Dean's Patent" plan.

But as we are not empowered to examine the weight of this testimony, the only question here is as to the propriety of the instructions. Those given by the court were as follows:

1. The jury is instructed that the burden of proof in this case rests on the defendant, Samuel Kem, to show that said Brolaski, in making said sale and for the purpose of inducing him to purchase said stock, made the false and fraudulent representations set forth in defendant's answer, and before the jury can find a verdict for Kem, they must believe from the testimony, that there is a preponderance of proof in support of the substantial allegations contained in the answer of the defendant, Samuel Kem, and that, in purchasing said gas stock, Kem relied solely upon the representations made to him by Brolaski.

2. The jury is instructed, that mere circumstances which tend to no definite or certain results, are not of themselves sufficient to establish the fact that Brolaski acted fraudulently in the sale of the gas stock to Kem; but any false and fraudulent representations or statements made by the said Brolaski in the sale of said stock to Kem, must be shown by the proof in the case, in order to maintain the defense set up in defend-

ant's answer. And it must also appear to the satisfaction of the jury, that Kem, in making the purchase, relied solely upon the statements made by the said Brolaski; and that he was induced to buy this stock upon said representations or statements.

3. Although the jury may believe from the testimony in the case, that Brolaski, prior to the sale of the gas stock to Kem, falsely and fraudulently represented to him that said company at that time was solvent, that its stock was worth par, that the gas manufactured by what is known as the Dean's Patent, was superior in brilliancy to the gas manufactured from the best quality of Pittsburg coal, and that the same could be manufactured for less money than it required to manufacture gas from coal, they must find a verdict for the plaintiff, unless the jury further believe from the evidence in the case, that Kem in making said purchase relied solely and exclusively upon the statements made by Brolaski in reference thereto.

4. The jury is instructed, as a matter of law, that false representations made by a vendor, in the sale of a chattel, to amount to a fraud upon the purchaser, must be known to be false when made, and made with the intent to deceive the purchaser. The jury is therefore instructed, that although they may believe, from the testimony, that Brolaski did make the statements and representations set up in Samuel Kem's answer, and that the representations so made by him were false, and that Kem was induced to make the purchase on account of those false representations and statements, yet, before the jury can find a verdict for Kem, they must further believe, from the testimony, that Brolaski, at the time he made the representations, knew that they were false and were made by him with intent to deceive Kem in the purchase of said stock.

5. If the jury believe, from the testimony, that the defendant, Kem, made the investment for which the note was given, relying solely on the strength of his own judgment and his confidence in the then future prospects of the company, they will find their verdict against him.

6. By the certificate of acknowledgment, appended to the mortgage, given by Kem and wife to secure the note sued on, it appears that they personally appeared before A. L. Loucks, a notary public, who took their acknowledgment to the same, that they were personally known to him to be the same persons who signed the mortgage as parties thereto, that they acknowledged to him that they executed the same as their voluntary act and deed for the uses and purposes therein mentioned, and that he, the said Loucks, prior to the taking of the acknowledgment of the defendant, Sarah E. Kem, made her acquainted with the contents of said mortgage, and that upon an examination separate and apart from her husband, she acknowledged that she executed the same, freely and without fear, compulsion or undue influence of her husband. The court therefore instructs the jury, that the matters stated in said certificate are "*prima facie*" true, and it devolves upon the defendants to show, by a preponderance of proof, that the facts as stated in this certificate are untrue; and unless the jury believe that the defendants have shown, by a preponderance of evidence, that the facts therein stated are false, they will find a verdict against the defendant, Sarah E. Kem, provided that they also find a verdict against Samuel Kem, her husband, upon the issues presented by his answer in this case.

7. The court instructs the jury, that false representations made by a vendor, in the sale of a chattel, to amount to a fraud upon a purchaser, must be known by the vendor to be false when made, and made with intent to deceive, and actually deceiving the buyer. If, therefore, the jury believe, that in the transaction between Brolaski and Kem, which resulted in the sale of the stock by the former to the latter. Brolaski made no false representations to said Kem concerning the matter, which he knew at the time to be false, and made with intent to deceive said Kem, the said Brolaski made no representations which amounted to a fraud upon said Kem in said purchase. It is not sufficient to justify the jury in finding fraud upon said Brolaski in said transaction, that they be-

lieve the representations made by him to said Kem were, in point of fact, false. They must further believe, from the evidence, that such representations were, at the time they were made, known to be false or not known to be true, by him, the said Brolaski, and made with the intent to deceive the said Kem.

8. The court instructs the jury that the defendant, Samuel Kem, cannot complain of any fraud to which he was, knowingly, a party.

9. The jury are instructed that fraud on the part of Brolaski, in the transaction between him and the defendant, Samuel Kem, which resulted in the purchase of the stock in question, must be established to the satisfaction of the jury, before they can return a verdict in this case in said Kem's favor.

10. If the jury believe, from the evidence, that the trade between Brolaski and Kem for the stock for which the note sued on was given was fairly conducted, made and concluded by and between them, then the verdict in this case must be for plaintiff.

There were twenty instructions asked by plaintiff, which were refused, and three instructions asked by defendants which were given; but it is clear, that the instructions above copied constituted the legal opinions advanced to the jury and covered all the points in the case.

One would hardly imagine that these instructions would be controverted by the plaintiff as they were so strongly in his favor.

The court, in these instructions, evidently did not adopt the opinion of Judge Story in Doggett vs. Emerson, (3 Sto., 733,) in which, that eminent expounder of equity law observed: "It appears to me, that it is high time, that the principles of courts of equity upon the subject of sales and purchases should be better understood and more rigidly enforced in this community. It is equally promotive of sound morals, fair dealing and public justice and policy, that every vendor should distinctly comprehend, not only that good

faith should reign over all his conduct in relation to the sale, but that there should be the most scrupulous and exalted honesty, or as it is often felicitously expressed, *uberrima fides*, in every representation made by him as an inducement to the sale. He should literally, in his representations, tell the truth, the whole truth, and nothing but the truth. If his representation is false, in any one substantial circumstance going to the inducement or essence of the bargain, and the vendee is thereby misled, the sale is voidable, and it is morally immaterial, whether the representations be willfully and designedly false, or ignorantly or negligently untrue. The vendor acts at his peril and is bound by every syllable he utters or proclaims, or knowingly impresses on the vendee, as a true or decisive motive to the bargain, and I cannot but believe, if the doctrine of law had been steadfastly kept in view and fairly upheld by public opinion, the various speculations, which have been so sad a reproach to our country, would have been greatly averted, if not entirely suppressed, by its salutary operation."

But Judge Story's view in regard to the necessity of requiring a vendor to "tell the truth, the whole truth, and nothing but the truth," seems not to have been generally accepted by the courts in this country in cases where the vendee stands upon an equal footing with the vendor, in regard to opportunities of inquiry, and through negligence, fails to inform himself from other quarters as to the truth of the vendor's representations, or relies on his own personal examination. In this case, the vendor was president of the company, whose stock he was selling, and the vendee had a right to presume, was fully informed in regard to the financial condition of the company and could not be reproached with negligence in failing to inquire in other quarters.

In the English Court of Chancery, Judge Story's strict views are fully sustained, and the knowledge or ignorance of the vendor in regard to the truth of his representations, where such representations are relied on by the vendee, regarded as immaterial. In Rawlins vs. Wickham, (Law Jour-

nal, 28 N. S. Equity, 188,) the vice-chancellor said: "It has been urged, that the means of verifying the representations which were unquestionably made to the plaintiff, were open to the plaintiff. But that is no defense against a charge of misrepresentation. It frequently happens, in cases of this nature, that the means of ascertaining the truth are within the power of the complainant, but it has never been held, that in order to entitle him to rescind his contract, he is bound to show that he resorted to all the means of information in his power. The very motive of misrepresentation is to check inquiries of this nature." In an appeal in this case to the lords justices, Lord J. Knight Bruce observed: "On the question, whether fraud has been practiced, it is not necessary to go any further; it may have been that this was not the only misrepresentation, but it is enough to say that this was distinctly proved. Is there any excuse, any apology for this? For Bailey there is none, as a professional man, personally attending the bank, and personally managing its affairs. I say, in the most pointed manner, that it was his duty to know what the books contained. Beyond a doubt, he was a party to the gross misrepresentations. On the other hand, Wickham was an inactive partner; he did not interfere with the customers, attended, only occasionally, at the bank, not meddling with the books, and knowing nothing of them, but still a partner, and not a sleeping partner, who had a right to examine the books and to make himself acquainted with the whole state of the business, and as between himself and a partner newly introduced, it was his duty to be so acquainted. What did he do? Whether with acquaintance, or lack of acquaintance with the affairs, it is proved that he joined with Bailey in the misrepresentations in producing the statement of accounts alluded to, and alleging it to be an accurate account of the position of the bank. He ought not to have asserted what he did not know to be true. If he did not know, it was his duty to say 'it may be correct or not, I do not know the facts, you must ascertain for yourself.' He did not say so. He joined in the assertion that

the falsehood was truth, and in the position in which he stood towards plaintiffs, I am clearly of opinion, that he was as much personally liable as if he had personally known the falsehood of what he asserted."

And Lord Justice Turner observed: "If in a treaty for a purchase, one falsely makes a representation, surely he cannot be afterwards heard to say that he knew nothing about the matter, and still more surely, he cannot be allowed to retain any benefit which he might have acquired from the representation which he has made. It is necessary to say this much, for it would be most dangerous to allow any doubt of this doctrine. The opposite principle would be opening a door by which to escape from every case of misrepresentation."

In N. B. & Can. Railw. Co. vs. Muggeridge, (1 Drew & Sm., 363,) the vice-chancellor observed, in regard to the necessary diligence on the part of the purchaser; "It is of no avail to say that Mr. Muggeridge was wanting in caution and vigilance and prudence. I agree, indeed, that to a certain extent he was so. A wise and prudent man would, I think, have paused before he embarked his money; and I have no reason to doubt, that if the defendant had gone to the office of the company, and made the inquiry, he would have been informed of all the details he chose to inquire about. I confess it does not appear to me necessary to suppose that there was, in this case, actual, intentional, fraudulent misrepresentation."

In Regnell vs. Sprye, (1 DeGex., Mac. & G., 708,) Lord Justice Cranworth says: "Once make out that there has been anything like deception, and no contract resting in any degree on that foundation can stand. It is impossible so to analyze the operations of the human mind, as to be able to say, how far any particular representation may have led to the formation of any particular resolution, or the adoption of any particular line of conduct. No one can do this with certainty, even as to himself, still less as to another. Where certain statements have been made, all in their nature capable, more

or less, of leading the party to whom they are addressed, to adopt a particular line of conduct, it is impossible to say of any one such representation so made, that even if it had not been made, the same resolution would have been taken, or the same conduct followed. Where, therefore, in a negotiation between two parties, one of them induces the other to contract on the faith of the representations made to him, any one of which has been untrue, the whole contract is in this court considered as having been obtained fraudulently."

In Story's Equity Jurisprudence, (§ 191), the principle is stated thus: "If a representation is made to another person going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good if he knows it to be false. To justify, however, an interposition in such cases, it is not only necessary to establish the fact of misrepresentation, but that it is a matter of substance or important to the interests of the other party, and that it actually does mislead him. For if the misrepresentation is of a trifling or immaterial thing, or if the other party did not trust to it, or was not misled by it, or if it was vague or inconclusive in its own nature, or if it was upon matter of opinion or fact equally open to the inquiries of both parties, and in regard to which neither could be presumed to trust the other, in these and the like cases there is no reason for a court of equity to interfere to grant relief on the ground of fraud."

This position of Judge Story seems to be the one on which the decisions of this court (Laughton vs. Green, 49 Mo., 363; Holland vs. Dudevon, 38 Mo., 56; Bryan vs. Hitchcock, 43 Mo., 527; McFarland vs. Carver, 34 Mo., 195) have been based.

In the present case, the representations were made by one, who, by his position, the law would presume to be better acquainted with the condition and prospects of the company of which he was president, than any one else, and therefore no inquiries outside could have been necessary. The failure to make such inquiries is no proof of want of diligence. The

instructions, therefore, though mainly predicated upon the decision above referred to, were undoubtedly more favorable to the plaintiff than he was entitled to.

It will be observed, that the instructions in this case required the representations of the vendor to be proved false and fraudulent and so known to be by him so that the vendee relied solely on them in his purchase. The verdict was under these instructions for the vendee. These instructions stated the law in the most favorable form for the plaintiff, undoubtedly more favorably than the decisions of Judge Story and the English Chancellors justified. We doubt if it is equity to allow a sharper to insist on a fulfillment of his bargain, on the ground that his victim was so destitute of sagacity as to make no further inquiries. We do not understand the decisions of the court to have gone so far. It will be seen that most of them have been in relation to the sale of lands, in regard to which, both buyer and seller had equal opportunities of informing themselves. When we reach a case where the parties do not occupy an equal footing in this respect we must pause. The doctrine enunciated by Judge Story deserves consideration and commends itself to an instinctive sense of justice, and therefore we think if any error was committed in the instructions in this case, it was on the side of the plaintiff below. But if we could be allowed to weigh the evidence in this case, upon the question of any fraudulent representations by Brolaski, we might find a different verdict.

This court has no province beyond deciding the law. The facts of a case are for juries in the courts that try the case, and the only question we have to determine is, whether the law is properly expounded to juries in the cases appealed from. We are satisfied that the law in this case was stated to the jury in the most favorable form it could have been for plaintiff, in fact more favorably than the adjudications authorize.

The testimony admitted or excluded upon exceptions on the issue—the main one in the case—so clearly, had no influence

on the result that we have deemed it unnecessary to notice it. The important exceptions have been heretofore noticed and passed on.

Judgment affirmed; the other judges concur.

GEORGE W. ROBINSON, Plaintiff in Error, *vs.* CHICAGO & ALTON R. R., Defendant in Error.

1. *Railroads—Fencing of field where highway intervenes.*—The spirit of the statute, (Wagn. Stat., 310–11, § 43) contemplates that railroad corporations shall fence the line of their road along an inclosed field, although a public highway abuts upon the road and intervenes between it and the field.

Error to Louisiana Court of Common Pleas.

W. H. Morrow, for Plaintiff in Error.

T. J. C. Fagg, for Defendant in Error.

WAGNER, Judge, delivered the opinion of the court.

Plaintiff brought his action for the value of three hogs killed by defendant's locomotive and cars; and the only question presented by the record is, whether the killing happened at a place where the defendant was required to fence its track. The case was tried in the court below upon an agreed statement of facts, the substance of which was, that the road where the hogs were killed was fenced on both sides, but that the fencing was not sufficiently strong and close to prevent the hogs from passing through, on to the line of the railroad; that the fencing was not such a fence as the law requires to be made on the sides of railroads, where the statute devolves that burden upon them, and that at the point on the line of the road where the hogs were killed, the road passes along or adjoining inclosed or cultivated fields on one side, and that the fencing on the other side of the road is on a line with the line of the Louisiana and Middleton gravel road, and is

contiguous with the line of the gravel road, on the side of the gravel road next to the railroad; that there is no intervening space of ground between the right of way of the railroad and the right of way of the gravel road, and that plaintiff's premises adjoin the opposite side of the gravel road, and that there are inclosed and cultivated fields on that side.

On this statement of facts, the court found for the defendant, and held as a conclusion of law, that the railway company was not bound to erect and maintain fences along the line of its road.

The statute (Wagn. Stat., 310, 11, § 43) declares, that "every railroad corporation formed or to be formed in this State, and every corporation formed or to be formed under this chapter, shall erect and maintain good and substantial fences on the sides of the road where the same passes through along or adjoining inclosed or cultivated fields, or uninclosed prairie lands." And the 5th section of the damage act, authorizes a recovery for all animals killed by the cars of any company, without proof of any negligence, unskillfulness or misconduct on the part of the servants of the company, provided the road is not fenced. (Wagn. Stat., 520.)

The argument for the defendant here is, that as the road bed abuts or adjoins a public highway opposite to the plaintiff's premises, the law makes no requirement that fences should be erected. But we think this is too narrow a construction of the statute. The fences are to be built where the road passes through, along or adjoining inclosed or cultivated fields, but if a highway or public road intervenes between inclosed fields and the railroad track, that will not dispense with the obligation to fence. There is even a greater necessity for it to subserve the objects for which fences were demanded. It is laid down as law by Redfield, that a railway running along the line of a highway is required to be fenced with especial care and watchfulness. (1 Redf. Railw., 5 Ed., 517.)

In the State of Indiana there is substantially the same statutory requirement that exists here, in reference to the rail-

roads erecting and maintaining fences, and the courts there hold, that the fact that a public highway runs along one side of the railroad does not, of itself, show a valid reason why a fence could not properly be run between the highway and railroad, but, on the contrary, would seem rather to show the greater necessity that the railroad should be fenced at such a place. (The Indianapolis & Cin. Railway Co. vs. Gerard, 24 Ind., 222; Same vs. McKinney, Id., 283; The M. & I. Railway vs. Whiteneck, 8 Ind., 217; The I. & C. Railw. vs. Townsend, 10 Ind., 38; The N. A. & S. Railw. vs. Tilton, 12 Ind., 3.)

It must be borne in mind that the law is not exclusively for the benefit of the owner of animals, or of adjoining proprietors, but it is in the nature also of a police regulation designed to promote the security of persons and property passing over the road. Such being the fact, the inference would seem to follow, that where a railroad runs along the side of a public highway, peculiar care should be taken to comply with the requirements of the statute.

I think the judgment should be reversed and the cause remanded. All the judges concur.

EDWARD RING, Plaintiff in Error, *vs.* MISSISSIPPI RIVER BRIDGE COMPANY, Defendant in Error.

1. *Damages—Railroads, suits against—Proceedings for condemnation—Appeal bond in.*—In an action of damages against a railroad company for appropriating plaintiff's land, it is no defense to the suit that defendant had commenced proceedings for condemnation of the property, and had appealed to the Supreme Court from the report of the commissioner. The appeal bond would not be held as an indemnity for plaintiff's damages.
2. *Railroads—Condemnation—Failure of company to pay damages—Trespass—Road liable for action of, when.*—The owner of land taken for railroad purposes may demand payment of his damages as a condition precedent to the appropriation. But if he waives this right, and permits the company to proceed in the construction of its work, he may nevertheless have his action at any time against the road for the injury done to his property. Where the road

fails to deposit with the clerk the amount assessed as damages, (Wagn. Stat., 327, § 3) but appeals from the report of the commissioners, any further interference with the property, till the question of damages is determined, would be trespass and render the company liable to an action therefor.

Error to Louisiana Court of Common Pleas.

Sharp & Broadhead, for Plaintiff in Error: cited in argument, Walther vs. Warner, 25 Mo., 277; Evans vs. Haefner, 29 Mo., 141.

WAGNER, Judge, delivered the opinion of the court.

Plaintiff brought his suit for damages against the defendant, for taking possession of and appropriating a strip of ground belonging to him, for the construction of a road track and approaches to their bridge.

The answer, among other things, set up that in pursuance of authority the defendant entered upon the premises for the purpose of appropriating the ground to build a track connecting the bridge with the railroad; that it took steps to have the same condemned by a proceeding duly instituted; that commissioners were appointed to view the premises and ascertain the amount of damages arising from the location and construction of the approach to the bridge, and that they made their report, which was approved by the Circuit Court, and judgment was rendered against the defendant thereon; that the defendant took an appeal to the Supreme Court, and gave an appeal bond in double the amount of the judgment; that the appeal was taken prior to the institution of this suit, and was still pending, and that by reason of the premises the plaintiff was fully indemnified against the supposed wrong or injury done by the defendant, and should, therefore, not be permitted to maintain his action.

The plaintiff filed his motion to strike out this portion of defendant's answer, because it constituted no legal defense, which motion was overruled. Plaintiff then took a non-suit, and after an unsuccessful effort to set the same aside, he sued out his writ of error to this court.

We suppose that the ground upon which the court below based its judgment was, that the appeal bond which the defendant gave in the proceedings for condemnation was a sufficient indemnity, and might be regarded as a compensation. But we think this is a mistaken view.

The appeal bond is not a bond for the payment of damages, but it is an obligation conditioned for the prosecution of the appeal with effect, and if the appeal is prosecuted with effect, and the case is reversed for some error of law, then the conditions are avoided, and the liability thereon ceases.

The principle is too well settled to require any argument or citation of authorities, that a company cannot condemn, appropriate or take possession of property and convert it to their own use, unless they make compensation to the owners. The owner has the right to demand as a condition precedent, the payment of his damages, but if he waives this right, and does not object to the company proceeding in the construction of their work, still he is entitled to proceed at any time for the trespass or injury done to his property. Section 3 of the statute, (Wagn. Stat., 327) in relation to the appropriation and condemnation of lands, provides that when the report of the commissioners is received and recorded by the clerk, the company shall pay to the clerk the amount assessed for the benefit of the party in whose favor the assessment is made, and on making such payment it shall be lawful for the company to hold the interest in the land. Section 4 then provides that on exceptions filed, the report of the commissioners shall be reviewed, but that notwithstanding such exceptions, the company may proceed to construct their road, and any subsequent proceedings shall only affect the amount of compensation to be allowed.

Both of the above sections must be construed together. When the report of the commissioners is received, the company may pay to the clerk the amount of damages assessed for the use of the party entitled thereto. They have then furnished the means for making compensation, and if the party does not accept, the company may nevertheless proceed

with the construction of their work, and the subsequent proceedings will only affect the amount of compensation. But if the company excepts and no deposit of the amount is made with the clerk, as the law requires, then they have no right to interfere with the property till the matter is finally determined and the title is acquired. If they do so they are simply trespassers, and liable to be proceeded against. The statute never intended to give them such a power, and the legislature would be incapable of bestowing it.

It may be very convenient for the party who is interested to invade and use private property without paying for it, but the Constitution interposes, and says it shall not be taken, unless compensation is made for it. If the company is not satisfied with the assessment of damages, and will not pay the money over to the clerk for the use of the party whose land is so sought to be taken, unless with his consent and license, they have no right to enter upon and use the land, till the proceedings in condemnation are finally concluded and this compensation is paid. If they do they are liable for damages.

I am therefore of the opinion that the judgment should be reversed and the cause remanded. All the judges concur.

WM. J. BARNETT, Respondent, *vs.* JOHN TIMBERLAKE, Appellant.

1. *Chattel mortgage—Possession before condition broken.*—The law is well settled that although a trustee or mortgagee of personal property is, after default made or condition broken, entitled to its possession, and considered in law as its owner, yet prior to that time it is equally certain that no such right of either possession or ownership exists.

Appeal from Audrain Circuit Court.

Forrist & Ladd, for Appellant.

I. The deed of trust was but a mortgage, with possession remaining in the mortgagor; and until condition broken the

rights of trustee or *cestuis que trust* were equitable only, to be protected by the equitable powers of the court, where only was he or they by virtue of the conveyance entitled to possession of the property. (7 Mo., 329; 8 Mo., 365, 615; 36 Mo., 322; 49 Mo., 395, *et seq.*; 1 Mo., 418.)

II. The condition of the mortgage was not broken, when suit was commenced, and respondent was not entitled to possession of the property.

Edwards & Harrison, for Respondent.

Sherwood, Judge, delivered the opinion of the court.

The defendant on the 7th day of March, 1871, was indebted to one Galbreath in the sum of $350, for which he gave his promissory note, due in one year after date. Several persons joined with the defendant in the execution of this note, only however, as sureties.

A few days after the execution of the note, the defendant executed to the plaintiff, as trustee, a deed of trust of certain personal property. The granting words in this instrument were: "bargain and sell, convey, deliver and confirm." The condition of the deed was that the defendant should pay the note at its maturity, and thus save his sureties harmless; in which case, the property so conveyed was to be released at his cost; but if default were made in the payment of the note the deed was to remain in full force, and the trustee to proceed to sell the property, etc., etc.

There was no delivery of the property mentioned in the deed, to the trustee, but the defendant retained possession until some time in the succeeding Fall, when it was taken from him by process issued in behalf of the plaintiff, who claimed in his petition that he was entitled to its possession. The defendant's answer was a general denial. The note was duly paid at its maturity, and the defendant exhibiting it to the plaintiff, demanded his property; but this demand was only partially complied with, the plaintiff retaining a portion of it which he sold after the note was satisfied and the pro-

ceeds were applied to the payment of the costs which had accrued in respect to the property and its keeping, in consequence of suit brought.

The whole case turns upon this: whether the court below erred in holding that the trustee need not await the maturity of the note, but could, under the deed, take immediate possession of the property.

The law is well settled, that, although a trustee or mortgagee of personal property, is, after default made or condition broken, entitled to the possession, and considered in law the owner of the property thus mortgaged, yet prior to that time, it is equally certain that no such right of either possession or ownership exists. The case of Sheble vs. Curdt, (56 Mo., 437) is decisive of this point. The granting words there employed were, "sells, transfers and sets over;" but no difference is perceived between the legal effect of those words, and those in the case at bar. In neither case did the grant become an absolute one, until condition broken. If the trustee or mortgagee is justly apprehensive that the property will be eloigned prior to the maturity of the demand which the deed is given to secure, he is not without remedy; but that remedy certainly does not consist in such an action as that to which the plaintiff has in the present instance resorted; for the obvious reason that such action must be based on the right of the plaintiff to the immediate possession of the property sued for. But as above seen, no such right attaches in the trustee until default occurs.

If follows that the plaintiff should not have recovered judgment in the court below even for costs, and that his sale of a portion of the trust property was entirely unwarrantable. It is unnecessary to notice the instruction asked by defendant as to the measure of damages for taking the property, because that instruction was evidently refused, not on account of its incorrectness, but for the reason that it was regarded inapplicable under the construction which was placed upon the deed of trust.

The judgment is reversed and the cause remanded; all the judges concur.

J. W. RITENOUR, Respondent, *vs.* W. J. HARRISON, *et al.*, Appellants.

1. Farmers' and Traders' Bank vs. Harrison, *et al.*, *post* p. 503, affirmed.

Appeal from Audrain Circuit Court.

Forrist & Ladd, for Appellants.

W. H. Kennan and G. B. Macfarlane, for Respondent.

LEWIS, Judge, delivered the opinion of the court.

The defendant's answer in this case assumed that the note sued on for $700 was, in fact, given to, and still held by the Mexico Southern Bank, although appearing to be the property of the plaintiff. Two defenses were then set up, viz: usury and release of sureties by indulgence given to the principal debtor. A default was taken against W. G. Harrison, and the issues raised by the other defendants were tried before a jury.

The leading facts and the legal theories applied to them by the court were substantially the same as in the case of the Farmers' and Traders' Bank vs. W. G. Harrison and others decided at the present term; and therefore, the opinion delivered in that case is here referred to and adopted for this. Some additional objections were taken in this case to the rulings below, but in our view of the law applicable to the principal subject matter, the defendant's rights could not be prejudiced thereby, and we deem it unnecessary to dwell upon them. Because the court erred in refusing to allow defendants even the qualified benefit of their plea of usury, as permitted by the statute, the judgment is reversed and the cause remanded for further proceedings in accordance with the principles settled in the opinion above referred to; the other judges concur.

FARMERS' & TRADERS' BANK, Respondent, *vs.* W. G. HARRISON, *et al.*, Appellants.

1. *Promissory note—Extension—Discharge.*—An extension granted to the principal debtor in a promissory note in consideration of usurious interest paid in advance, will not operate a release of the surety.
2. *Usury—Criminality—Illegality.*—Usury is not now considered a crime, so as to render invalid every contract into which it enters. The contract is illegal, only to the extent of the forbidden excess of interest.
3. *Powers, limitations upon.*—Limitations upon powers to be exercised by corporations and by individuals, are to be interpreted alike in both cases by the terms in which they are expressed, and without reference to whether the powers be inherent or conferred.
4. *Corporations, acts of, void in part or in whole, rule touching.*—If a corporation does an act not within the authorized objects of its charter, or performs an authorized act by a prohibited method, the act will be wholly void. But if the departure or violation apply only to the measure of extent or quantity in an authorized procedure, then the act will be valid up to the prescribed limit, and void only as to the excess.
5. *Corporations, loans by—Usurious interest.*—The statute authorizing the formation of banking corporations with power to loan money "at a rate of interest not to exceed ten per cent. per annum," does not render void a note taken for a loan at a greater rate of interest.
6. *Corporations, usurious contract with, governed by the general law.*—Usurious contracts made with corporations are governed by the general law relating to interest and usury; and suits upon them must be disposed of in like manner as in cases of such contracts between private persons.

Appeal from Audrain Circuit Court.

Forrist & Ladd, for Appellants.

I. As to interest, the corporation is controlled by its charter and not by the general law of usury of the State. (U. S. Bank vs. Owen, 2 Pet., 527; Assignee of Darby vs. Boatmens' Savings Bank of St. Louis, not yet reported; State Bank vs. Coquilard, 6 Ind., 332; Ryan vs. Valandingham, 7 Ind., 416.)

II. The charter of respondent gave to it no power to loan at a higher rate than ten per cent., and so any contract for a loan at a higher rate would be void. (Bank of Chillicothe vs. Swayne, 8 O., 257; Bank of Wooster vs. Stephens, 1 O. St., 233; VanAlta vs. State Bank of Ohio, 9 O. St., 27-33; Utica Ins. Co. vs. Caldwell, 3 Wend., 302; Beach vs. Fulton Bank, 3 Wend., 583.)

Some of the cases hold that the note only given for the money loaned would be void, while an action in favor of the corporation on the common count for money loaned, could be maintained against the borrower, but all hold the note void, and in the case at bar the suit is founded on the note only.

The declaration asked by respondent should not, and that asked by appellants should, have been given.

III. The extension of time of payment of a note by the holder for a valuable and independent consideration paid by the principal for a definite time, by agreement between the holder and principal, without the knowledge and consent of the surety will discharge the surety. (Burge Sur., 203-4; Chitt., Bills, 408-9.)

G. B. Macfarlane, for Respondent.

I. The charter of respondent is the general law of the State upon Savings' Banks. (Art. VI, ch. 37, Wagn. Stat., p. 329.) By its charter, authority is given to loan money on real estate or personal security. The rate of interest to be charged is fixed at ten per cent. per annum, and a greater rate forbidden. No penalties or forfeitures are provided for exceeding the prescribed rate of interest, and the charter is silent as to the effect of taking a higher rate of interest than is fixed by the law.

II. The charter gives respondent the power to loan money; that is its principal business. It is true that a corporation can exercise no power not expressly given, but when a power is given a corporation to do an act it possesses the power to the same extent as an individual possesses it, and is subject to the same penalties and forfeitures for exercising that power in a manner different from, or in excess of, the prescribed manner of exercising it. (Farmers' Bank vs. Burchard, 33 Vermont, 372; Morse Banks and Banking, 17.) In our State an individual is forbidden to loan money at a rate exceeding ten per cent. per annum. (2 Wagn. Stat., 783.) If no penalty were attached to the violation of this statute the contract of an individual would be *ultra vires*

and void, according to the earlier authorities. But sec. 5 prescribes a penalty for an infraction of the law. The charging more than ten per cent. is not wrong in itself, but is wrong because prohibited by law. The same may be said of respondent's charter. There can be no question that it is competent for the legislature to say what shall be the consequences of a violation of the law. (Rock-River Bank vs. Sherwood, 10 Wis., 239.) We should look to the general laws of the State on the subject of interest to find the effect of an excessive charge of interest, because:

1st.—Had the legislature intended otherwise, it would have prescribed the consequences in the charter, but the charter being silent we look to the general laws.

2nd.—Because courts never inflict penalties, and a heavier one could not be inflicted upon a Banking Institution than the avoidance of the debts due it. (1st. Mass., 167; 2 Johns., 339; Planters' Bank vs. Snodgrass, 4 How. [Miss.], 586.)

3rd.—The general law of the State, prescribing penalties for the violation of the interest law, by its express terms, includes artificial as well as natural persons.

4th.—It is a well settled rule that where the contract of a corporation is part void and part legal, the same rule of construction prevails as in the contract of natural persons; that which is legal will be enforced if it can be separated from that which is illegal. (7 How. Miss., 523, *et seq.*)

5th.—The overwhelming weight of authority supports this position. (See Planters' Bank vs. Snodgrass, 4 How. [Miss.], 586; Fleckner vs. Bank of the United States, 8 Wheat., 355; 3 Pet., 36; Maine Bank vs. Samuel Butts, 9 Mass., 52; Philadelphia Loan Co. vs. Towner, 13 Conn., 154; Bank of Alexandria vs. Manderville, 1 Cranch, C. C. R. 552; National Exchange Bank vs. Moore, 1 Bank Reg., 123; Rock-River Bank vs. Sherwood, 10 Wis., 239; Durkee vs. The City Bank of Kenosha, 13 Wis., 216; Browmer vs. Height, 18 Wis., 102; Planters' Bank vs. Sharp, 4 S. & M., 75; Grand Gulf Bank vs. Archer, 8 S. & M., 151; Com'l Bank vs. Nolan, 7 How. [Miss.], 508; McLean, assignor, etc. of Manard vs. Lafayette Bank,

3 McLean, 587; Veazie Bank vs. Paulk, 40 Me., 109; Lyon vs. Bank of Alabama, 1 Stew., 468; Saltmarsh vs. Planters' and Merchants' Bank of Mobile, *Id.*, 761; Farmers' Bank vs. Burchard, 33 Vt., 346; Morse on Banks and Bank'g, 17; Bank of Louisville vs. Young, 37 Mo., 407; Marks vs. The Bank of the State of Missouri, 8 Mo., 318. It will be seen, from the authorities cited, that the question has been considered and passed upon by the courts of Maine, Massachusetts, Connecticut, Vermont, Wisconsin, Alabama and Mississippi, and all concur with singular unanimity that the effect of a bank charging excessive interest is to be ascertained from the general law of the State on the subject of interest. In the following cases the usury laws have been applied to the transactions of banks *sub silentia* without question on either side. (Bank of Burlington vs. Durkee, 1 Ver., 404; *Id.*, 430; 12 Pick., 586; United States Bank vs. Waggener, 9 Pet., 378; 1 Pet., 43.)

IV. The first special defense was not a plea of the statute of usury. To take advantage of the usury law, a party is required to plead it specially. The demurrer was properly sustained unless the note was void. (Rock-River Bank vs. Sherwood, 10 Wis., 239.) The effort in this case was to avoid the whole contract. (Speaker vs. McKenzie, 26 Mo., 255.)

V. The declaration of law given respondent by the court was proper. A contract to extend the time of payment of a note in consideration of the payment of usurious interest is not a contract which the law will enforce. Wiley vs. Hight, 39 Mo., 133; Marks vs. The Bank of the State of Missouri, 8 Mo., 319; Chitt. Bills, 102.)

Lewis, Judge, delivered the opinion of the court.

This was a suit against the appellants and W. G. Harrison upon a promissory note for $300. A default was taken against W. G. Harrison, and the appellants answered with two defenses: 1. That the note was given for money loaned at usurious interest, and was therefore void. 2. That appellants

were only sureties, and were released from liability by reason of an extension given, for valuable consideration, to the principal debtor, without their knowledge or consent.

To the first defense plaintiff filed a demurrer for insufficiency in law, which was sustained by the court. Issue was joined on the second, and tried by the court, which found for the plaintiff, and rendered judgment in his favor for the full amount of the note and interest.

As to the second of these defenses, the record presents but little difficulty. The extension granted was founded upon the payment of usurious interest in advance, by way of consideration. It is well settled by adjudications of this and other courts that such a consideration creates no legal obligation on the holder to refrain from suit upon the note, and hence there can be no release of the sureties. The court's declaration of law to this effect was unobjectionable. (Marks vs. Bank of Missouri, 8 Mo., 316; Wiley vs. Hight, 39 Mo., 130.)

The first defense introduces a subject which has been much discussed in other States, and in the federal courts. The point made by the appellants is, that while by our general law the taking of too much interest by a natural person does not destroy the principal contract, but only incurs certain minor losses to the wrong-doer, yet a corporation, whose charter limits the amount of interest for which it may agree, cannot exceed that limit and make a valid contract; that the power to loan and the limit as to interest, constitute the elements of a single grant; and as both are made essential, if either be wanting, the grant fails, and no contract can result for lack of power to make it.

The plaintiff became a corporation under Art. VI of the law concerning private corporations, (ch. 37, Wagn. Stat., 329) by which it is "permitted to carry on the business * * * * * of loaning money on real estate and personal security at a rate of interest not to exceed ten per cent. per annum." It appeared from the evidence, that the loan in this case was at the rate of about eighteen per cent. per annum.

Hitherto, loans made by banking corporations upon usurious interest, have received the same treatment in Missouri as transactions of the same sort between private persons. When the defense was successfully maintained, the courts have habitually rendered judgment for the principal sum, and ten per cent. interest, setting apart the interest to the county school fund, as directed by the general law. The appellants here demand, with an imposing array of judicial indorsements, that we revolutionize this custom, and declare that notes given under such circumstances to a bank are absolutely void, and the lender cannot even get back the money advanced to the borrower. A proposition so presented and so affecting the large moneyed interests of a commercial people, may well demand a careful examination of its merits.

The chief authority used to sustain this proposition is the case of the Bank of the United States vs. Owens, (2 Pet., 527). The charter of the corporation plaintiff contained this provision: "The bank shall not be at liberty to purchase any public debt whatever, nor shall it take more than at the rate of six per cent. per annum for or upon its loans or discounts." Mr. Justice Johnson, delivering the opinion of the court, used this language: "The question here propounded has relation exclusively to the legal effect of a violation of the provision *in the charter* on the subject of interest, and does not bring in question the operation of the statute of usury of Kentucky upon the validity of this contract. To understand the gist of the question, it is necessary to observe, that, although the act of incorporation forbids the taking of a greater interest than six per cent., *it does not declare void* any contract reserving a greater sum than is permitted. Most if not all acts passed in England and the States on the same subject, declare such contracts usurious and void. The question then is, whether such contracts are void in law *upon general principles*.

"The answer would seem to be plain and obvious, that no court of justice can, in its nature, be made the hand maid of iniquity. Courts are instituted to carry into effect the laws of a country. How can they then become auxiliary to the

consummation of violations of law? * * * * There can be no civil rights where there can be no legal remedy, and there can be no legal remedy for that which is in itself illegal."

Hence, it being admitted that the contract was for a rate of interest greater than six per cent., the court declared the note given to be void. This is claimed to be as conclusive for the appellants as any proposition can be made by direct authority from an exalted source. But there are many reasons why it fails to determine here the main question involved.

It will be observed that the court, although referring to the charter, treats it as inoperative for the purposes of the inquiry, and refuses to test the question by the extent or limitation of power granted to the bank. It proceeds upon the general "iniquity" or unlawfulness of the transaction, which would apply as well to the case of an individual as to that of a corporation. Its position is fortified by reference to the "acts passed in England and the States," which "declare *such contracts* usurious and *void*."

We have in Missouri no such legislative acts. The "iniquity" of an usurious loan has long since disappeared from our jurisprudence, except as to the excess above the authorized rate of interest. Even in courts of equity, everywhere—which are considered as the purest tribunals—when usury is established, the contract will be enforced for the sum loaned, and the borrower compelled to pay it back.

The United States Supreme Court (4 Pet., 205) says, that "usury is now only considered an illegal or immoral act, because it is prohibited by law." Says another authority: "Usury has now ceased to be a crime. It is unlawful to the extent that it is made so by statute, and no further." (7 How. Miss., 535.)

It would seem, then, that the measure of illegality or immorality, is the extent of the prohibition. And that applies not to the *loan*, in which there is no moral vice, but only to the forbidden excess of interest.

It is to be observed, further, that in the Owens case, the questions submitted from the United States Circuit Court in Kentucky, distinctly predicated that the contract was founded upon a "*corrupt* and *unlawful* agreement." So that the inquiry in the Supreme Court was really confined to a field in which, as already shown, our present investigation has but little interest. But in any view of the case, it can never be said that the record of that august tribunal has committed it against the intrinsic validity of every note tainted with usury.

In Fleckner vs. The Bank of the United States, (8 Wheat., 355) the same court had under consideration the provision in the United States bank charter above quoted. Then it said: "The taking of interest by the bank beyond the sum authorized by the charter would be a violation for which a remedy might be applied by the government: but as the act of congress does not declare it shall avoid the contract, it is not perceived how the defendant could avail himself of this ground to defeat a recovery." This was before the decision in the Owens case. But long afterward, in The Bank of United States vs. Waggener, (9 Pet., 378) the same court, per Mr. Justice Story, quotes and adheres to the above passage from the opinion in the case of Fleckner. So, that, in the opinion of the Supreme Court, a chartered limitation upon the rate of interest for a bank loan will not, *per se*, avoid the contract so as to avail the borrower.

The next case relied upon is Bank of Chillicothe vs. Swayne (8 Ohio, 257). The general statute of Ohio entitled creditors to "interest at the rate of six per centum per annum, and no more." In the bank charter the phraseology was, "that said corporation shall not take more than at the rate of six per cent per annum on its loans or discounts." No penalty was affixed in either case. The court held that, in contracts between individuals, a reservation of excessive interest would not render the contract void, and that the creditor might recover the principal sum with lawful interest; but that in the case of a corporation, the whole contract was void, because the limitation, in effect, withheld the power to make any such

contract. This precisely fits the views of the appellants here.

The reasoning of the Ohio court is based upon two fundamental propositions: 1. That natural persons have an inherent right to contract, subject only to such positive restraints as the law may impose; while corporations have only a conferred right to make contracts, and cannot make any but such as are expressly authorized. 2. That when a corporation is empowered to do anything in a particular way, it cannot effectually do that thing in any other way; so that, if the prescribed method be departed from, the act is void. These propositions form also a basis for the very able argument of appellants' counsel here. As to the first, I cannot see what difference it makes whether the power to contract be inherent or conferred, when the limitation upon its exercise is the same in either case. Let it be admitted that the natural person has, inherently, an unlimited power of making loans. Suppose the same general unlimited power of making loans, be conferred by the legislature upon a corporation. Both will then stand upon the same footing, as to all the methods or effects of an exercise of the power. If, then, the legislature impose upon both the same limitation, surely both will still occupy the same ground; for if equals be added to equals the sums will be equal. The *origin* of the qualified power in either possessor is a thing of the past. Its operation and tendencies belong to the present and future, and they must be the same in both cases. The individual in Ohio had a general power to loan money, subject to a specific limitation. The Ohio incorporation was invested with the same general power, subject to the same specific limitation, expressed in nearly the same words. Why should a disregard of the limitation work a total destruction of the power in one case and not in the other?

As to the second proposition, the court lost sight of a distinction universally recognized. If power be given to a corporation to do an act in a particular way—as to loan money on personal security—and it adopt a different method of per-

formance—as by making a loan on real estate—the act is *ultra vires* and void. If, however, the departure apply, not to the method itself, but purely to extent or quantity in an authorized feature, then the act is good up to the limit of extent or quantity, and void as to the excess. The test inquiry is, whether part of the undertaking may be cut off, and what remains be in fulfillment of the law. Coke says: "Where a man doth that which he is authorized to do, and *more*, there it is good for that which is warranted, and void for the rest." (Coke, Litt. 258.)

Not to multiply illustrations, the familiar case of a partnership will suffice. Each partner has a general authority to make contracts within the scope and objects of the partnership. But if one make a single contract embracing matters both within and without the scope and objects of the association, it is universally held to be good as to the former, and void as to the latter. The rule applies equally to corporations. Some other cases are cited by appellants, but all their force is derived from the two just disposed of. A majority are cases in which corporations undertook to perform acts wholly outside of the scope and objects of their organization.

The high authorities which hold a contrary view on the subject of our inquiry are very numerous. Their general doctrine is to the effect that a charter prohibition upon the rate of interest, whether with or without a penalty, will not avoid a loan for a greater rate, except as to the excess. In one class of cases it is held that, while such an usurious loan may so violate the charter as to incur a forfeiture of the franchise, yet the corporation may maintain a suit upon the note given for the principal sum and lawful interest. And in all it seems to be agreed that, whatever the effect of such a general charter restriction otherwise, the borrower cannot be allowed to keep the money upon the strength of his own complicity in an unlawful act. In some, the plaintiff is required to maintain his action on the count for money loaned. In many others, the declaration on the note is held to be sufficient. The cases are too numerous to be cited here. Upon the whole,

we consider the weight of authority overwhelmingly against the position taken by the appellants.

But an argument is drawn from the peculiar structure of our statutes which deserves notice. The general interest law (Wagn. Stat., 782) provides that "the parties may agree, in writing, for the payment of interest not exceeding ten per cent. per annum," etc., and that "no person shall, directly or indirectly, take for the use or loan of money or other commodity, above the rates of interest specified, etc." It then proceeds to define the consequences of violation. The defense of usury being sustained in a suit upon any bond, note, etc., the court shall render a judgment for the principal sum and ten per cent. interest; of which the principal sum only goes to the plaintiff and the interest to the county school fund. Comparing this statute with the one relating to corporations, it is claimed that as these defined consequences are not appended or recognized in the latter, therefore they are not to be applied at all, and the only consequence left for a violation of the law by a corporation, must be that the contract shall be held void. It is already shown that, in our opinion, if the corporation statute be considered alone, an usurious contract will not, by reason of it, be wholly void. It is not perceived how the enactment of another law, applying, as is claimed, not to corporations at all, but only to individuals, can reverse that interpretation.

The true judicial process is, to take all the laws in force at a given time, upon the same subject matter, as if uttered in one breath, or with a single purpose. We are not to treat them as the vagaries of a man bereft of reason, who announces a fixed intent in one moment, and its opposite in the next. It is safe and fair to bring together in familiar language the several effects of different enactments. We have a statute (Wagn. Stat., 887) which, after declaring that plural words shall be deemed to include "any single matter, party or persons," prescribes that "where any subject matter, party or person is described or referred to by words importing the singular number or the masculine gender, several matters and

persons, and females, as well as males, and *bodies corporate as well as individuals*, shall be deemed to be included." Now, by the method of collocation above suggested, the effect produced will appear about thus: 1. Corporations may loan money "at a rate of interest not exceeding ten per cent. per annum."

2. Parties, whether persons or corporations, "may agree in writing for the payment of interest not exceeding 10 per cent. per annum."

3. No person or corporation "shall directly, or indirectly, take for the use or loan of money above the rate of interest specified," etc.

4. If in any suit upon a note, bond, etc., it shall be made to appear that the foregoing rules have been violated, the court shall render judgment for the principal sum, and 10 per cent. interest, setting apart the interest to the county school fund, etc. If the provision of the general law applying to persons were different as to rate of interest or other essential particular from that found in the charter of the corporation, then the effect might be otherwise; for, while considering the provisions together, the general would necessarily yield to the special. But here is no conflict, repugnance or disagreement; only a general result, which harmonizes—though reached by a different process—with adjudications in nearly all the States where the charters of corporations and the general interest laws stand in similar relations to each other, as in Missouri.

We conclude, that when a note given to a banking corporation, created under the general statutes, is found to be tainted with usury, the results will be the same, and none other, as in the case of a note given to a natural person.

The court below erred, therefore, in overruling the demurrer, and in giving judgment to the plaintiff for the whole amount of the note and interest. Its judgment is reversed and the cause remanded.

The other judges concur.

WILLIAM FLENTGE, Appellant, *vs.* JOHN V. PRIEST, Respondent.

1. *Replevin—Motion to dismiss.*—Where property was seized under a writ of replevin issued from the Cape Girardeau Court of Common Pleas, and the Judge of the Circuit Court for that county had issued his warrant in vacation, directing the property to be delivered to the defendant, and the property was so delivered in pursuance of such order: *Held,* that a motion to dismiss the action of replevin, on the ground of such warrant and delivery, and because the process issued by the Circuit Judge ousted the jurisdiction of the Court of Common Pleas, was improperly sustained. If there was any valid defense it should have been taken by answer but could not be reached by a motion to dismiss.

Appeal from Cape Girardeau Court of Common Pleas

Louis Houck, for Appellant.

Lewis Brown, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

The plaintiff brought his action in the nature of replevin, in the Cape Girardeau Court of Common Pleas, to recover possession of the books, records, etc., belonging to the office of the clerk of the County Court of Cape Girardeau county. A bond was filed with the petition, a writ was issued, and the property was seized and delivered to the plaintiff. At the return term the defendant appeared and moved the court to order the return of the property, and to dismiss the suit; because the judge of the Circuit Court within and for the county, had issued his warrant in vacation ordering the property to be delivered to the defendant, and that in pursuance of the warrant the same was delivered to the defendant; that the seizure made by the sheriff under the process issued by the Circuit Judge ousted the jurisdiction of the Court of Common Pleas, and therefore the court could not make or enforce any order in the premises. The court sustained the motion, and dismissed the case.

It is clear enough that the court erred in dismissing the case. If there was any valid defense, it should have been taken by answer, but it could not be reached by motion. The

plaintiff showed a good case upon the face of his petition, and was turned out of court upon extraneous matters, without the privilege of being heard.

The warrant of the judge, to have been available, should have been set up in the answer, accompanied with the necessary averments. (Flentge vs. Priest, 53 Mo., 540).

The judgment must be reversed and the cause remanded; the other judges concur.

H. F. V. BRAWNER and W. A. BRAWNER, her husband, Respondents, *vs.* P. S. LANGTON, Appellant.

1. *Partition fences—Adjoining proprietors—Right of contribution.*—Under our statute, (Wagn. Stat., 633, § 1) where the owner of land puts up a sufficient fence on his line, and the adjoining proprietor afterwards uses it as a part of his own inclosure, the builder of the fence is entitled to recover from the adjoining proprietor half of the value of the fence; and if the builder sells his land before he has recovered such contribution, the right of recovery passes to his grantee.

Appeal from St. Louis Circuit Court.

Bakewell, Farrish & Mead, for Appellant.

W. J. Sharman, for Respondents.

VORIES, Judge, delivered the opinion of the court.

This action was brought before a justice of the peace, to recover one-half of the value of a partition fence, charged to have been erected by plaintiffs on the dividing line which separates the land of plaintiffs and defendant, and which fence is used by defendant as an inclosure for his lands. The action is brought under the three first sections of chapter 57, (Wagn. Stat., 1870, p. 633).

Freeholders were appointed under the 2nd section of the act referred to, who viewed and estimated the value of one half of the fence, erected by plaintiff, at the sum of twenty-three dollars. It was to recover this sum that the action was brought.

The plaintiff recovered a judgment before the justice, from which the defendant appealed to the St. Louis Circuit Court,

where the plaintiff again recovered a judgment against the defendant and the sureties on his appeal bond for the amount claimed with interest and costs. The defendant in due time filed a motion for a new trial, which being overruled by the court, he appealed to the General Term of the St. Louis Circuit Court, where the judgment rendered at Special Term was affirmed; from which action of the General Term the defendant appealed to this court.

The only thing set forth in the bill of exceptions in this case, which could be assigned for error in the action of the Circuit Court as a ground for a reversal of the judgment, is the following agreed state of facts, which constitutes the whole bill of exceptions in the case, to-wit: "Be it remembered, that on the trial of this cause it was admitted that the plaintiff and defendant owned in St. Louis county, respectively, a piece of land, which land of plaintiff was adjacent to that of defendant; that plaintiff's grantor inclosed his land by a good and substantial fence, and thereby the defendant's land was inclosed on one side, and defendant inclosed the other sides afterwards." It was also admitted that the fence was worth the price at which it was appraised. This was all of the evidence. The defendant offered the following instructions:" (no instructions are copied in any part of the record).

The bill of exceptions then sets out the defendant's motion for a new trial, the grounds for which, as stated in the bill of exceptions, are: "That the judgment of the court is against the law, the evidence and the weight of evidence, because the court gave improper and illegal instructions, and because there was no evidence to support the assessment of damages." The defendant excepted to the opinion of the court in overruling his motion for a new trial, which is the only exception taken in the case, on the trial of the case at special term.

The only ground for a reversal of the judgment insisted on by the defendant in this court is, that the agreed facts in the case show that the fence sued for was erected by the grantor of the plaintiffs, before their purchase of the land, and

that, therefore, notwithstanding the defendant is using the fence as a partition fence which was erected by the grantor of the plaintiffs, the grantor of the plaintiffs and not the plaintiffs, has a right to recover for one-half of the fence, if any recovery can be had.

The first section of the act under which this suit is brought is as follows: "§ 1st. That whenever a fence, of whatsoever material constructed, and in all respects such as a good husbandman ought to keep, shall have been erected, or shall hereafter be erected on the line of his land, or that on which he may have a leasehold for any term of years, and the person owning the lands adjoining, or having a leasehold for any term of years on the same, shall make or cause to be made, or shall now have an inclosure on the opposite side of such fence, so that such fence may answer the purpose of inclosing his field, meadow, lot or any other inclosure, such person shall pay the owner of such fence already erected one-half the value of so much thereof as serves as a partition fence."

The construction attempted to be given to this section of the statute is entirely too limited and contracted. The statute does not confine the right to recover for a fence already erected to the person who shall have erected the same; but it provides that the payment for one-half of the value of the fence shall be made to "the owner of such fence already erected." When the plaintiff purchased his land with the fence on it, he became the owner of whatsoever right his grantor had in the fence, and became possessed of all his rights. If a person erecting a partition fence receives pay from an adjoining proprietor for one-half of the fence, and then sells the land, of course he, under such circumstances, being the owner of only one-half of the fence, could only transmit to his vendee one-half. And in such case, no further recovery could be had from the adjoining proprietor, for he would already be the owner of one-half the fence; but where a purchaser becomes the owner of the whole fence he may recover for one-half of the value from an adjoining owner.

The judgment is affirmed; Judge Wagner absent; Judge Lewis not sitting; the other judges concur.

FREDERICK W. HARRINGTON, Plaintiff in Error, *vs.* JAMES T. UTTERBACK, *et al.*, Defendants in Error.

1. *Homestead—Equity—Cloud on title.*—A bill in equity will lie to secure relief from a cloud cast on title to real estate, by a sale under execution of property exempt under the homestead law. And such jurisdiction in equity is not ousted by the fact that a legal remedy is afterwards afforded, unless abolished by some prohibitory legislative enactment.

Error to Montgomery Circuit Court.

C. H. Lee and Daniel Dillon, for Plaintiff in Error, cited: Vogler vs. Montgomery, 54 Mo., 577; Clark vs. Cov. Mut. Ins. Co., 52 Mo., 276.

Powell and Hughes, for Defendants in Error, cited: Drake vs. Jones, 27 Mo., 428.

E. Wells, for Defendants in Error, cited: Kuhn vs. McNeil, 47 Mo., 389; Drake vs. Jones, 27 Mo., 428.

SHERWOOD, Judge, delivered the opinion of the court.

The plaintiff is the owner of a house and lot in the town of New Florence, an incorporated town of less than forty thousand inhabitants. The lot does not include more than thirty square rods of ground, nor with the appurtenances, exceed in value the sum of fifteen hundred dollars. The plaintiff is the head of a family, and for a long space of time has owned, occupied and claimed the property as his homestead, and he is still in possession of, and using it, for the above mentioned purpose.

After the acquisition of his homestead, the plaintiff became indebted, judgments were rendered against him, and the homestead sold under executions; the defendants becoming the purchasers, and placing upon record the deed which they received from the sheriff, although they were fully apprised of the plaintiff's rights in the premises.

A petition alleging in substance the foregoing facts and praying for appropriate relief, was held insufficient on demurrer, and this necessitates an examination into the sufficiency of the petition.

If we look alone to the record in this case, we find that the defendants are the owners of the property; and in order to rebut and overthrow this *prima facie* case, which the records establish, resort must be had to extrinsic evidence, and parol evidence at that, to prove that the plaintiff is the true and rightful owner of the property, the records to the contrary notwithstanding; and that the defendants acquired nothing by their purchase. In cases of this sort the rule is well settled in this State, that a party in the situation of the plaintiff, may, under the circumstances detailed in his petition, very properly invoke equitable interposition to remove the cloud cast upon his title.

In the case of Clark vs. The Covenant Mutual Life Insurance Co., (52 Mo., 272) the cloud on the title consisted of a forged deed, which although a nullity, yet apparently constituted a link in the regular chain of conveyances, tending to obscure plaintiff's title and prevent her from using or disposing of her property; and without resorting to extrinsic evidence the title of her supposed grantee was a perfect one. And this court in that case did not entertain the slightest doubt that the plaintiff was entitled to the relief sought.

In the case of Merchants' Bank vs. Evans, (51 Mo., 335,) it was held, that where the defect was of such a character as to render the deed invalid, but yet even this could only be discovered by a mind of legal acuteness, equity ought to interpose and remove the cloud.

In Vogler vs. Montgomery, (54 Mo., 577) it was urged as a reason why the proposed sale of Vogler's homestead should not be enjoined, that such sale would pass no title; but this objection did not prevail, for this court held, in affirmance of the action of the court below, that an injunction might well go to prevent litigation, a cloud from being cast over the plaintiff's title, and a future sale of the property by plaintiff from being embarrassed.

It is however contended by defendants, that inasmuch as the plaintiff, as shown by his petition, is in possession of the property, and could resort to statutory proceedings to com-

pel defendants to bring an action to try the title, therefore, his remedy is full and complete at law.

But it by no means follows that equitable jurisdiction is ousted on that account. If such jurisdiction existed, as in the present instance, anterior to the time when a legal remedy was afforded, it will continue to exist until abolished by some prohibitory legislative enactment. (1 Sto. Eq. Jur., §§ 64, 80, and cases cited; Stewart vs. Caldwell, 54 Mo., 536.)

Besides, even if plaintiff should resort to and be successful in the proceedings suggested, at their termination he would still have to invoke the aid of equity, or else continue to have his title overcast by the conveyance to defendants, remaining of record, and this is sufficient to show that the remedy at law is inadequate. While, on the contrary, by his present method of procedure, if he shall succeed in procuring a decree therein, such decree being spread upon the records, will completely neutralize any apparent effect defendant's deed would otherwise create.

Judgment reversed and cause remanded; the other judges concur.

HAMILTON HALL, Respondent, *vs.* KIT JOHNSON, *et al.*, Appellants.

1. *Practice, civil—Trials—Instructions—Mechanic's Lien.*—An instruction in a suit on a mechanic's lien, that "if they find the account as stated in the petition or any part of it due plaintiff, then plaintiff has a lien on said building and lot, for the amount found due," is erroneous because it ignores the question whether the plaintiff has taken the steps necessary to secure his lien.

Appeal from Audrain Circuit Court.

S. A. Craddock and Forrist & Ladd, for Appellants.

I. The 6th instruction was manifestly erroneous, because it told the jury that respondent was entitled to his mechanic's lien, if they found any sum due to him for appellants.

This made his right to enforcement of his claim for a lien depend only upon the fact that appellants were indebted to him and excluded all the statutory requirements as essential to a lien. (Mead vs. Brotherton, 30 Mo., 201; 51 Mo., 441.)

II. All the issues were not found. (Fenwick vs. Logan, 1 Mo., 401; *Id.* 495; Hickman vs. Byrd, *Id.*, 495.) Whether or not the respondent was entitled to his lien, was one of the issues and should have been passed upon by the jury. (Williams vs. Porter, 51 Mo., 441; Morris vs. Morris, 27 Mo., 114–117; *Id.*, 320; Gibson vs. Long, 29 Mo., 133; Hause vs. Carroll, 37 Mo., 579.)

G. B. Macfarlane, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

This was an action to enforce a mechanic's lien, brought by plaintiff against defendants as the trustees of the colored Baptist Church, in the city of Mexico, and as original contractors, for the material used in the erection of a house of worship.

The petition contains the usual allegations, and the answer traverses those of any particular importance. The evidence adduced was conflicting, and the trial resulted in a verdict for the plaintiff, and a judgment enforcing the lien as prayed for.

It is impossible to form any opinion as to the correctness of the instructions given on behalf of plaintiff, as to the force and effect of the deed made to defendants, as it has not been preserved in the record. With the exception to be presently noticed, the instructions on the part of plaintiff as well as defendants, as to whether the latter either directly or through those whose acts they expressly authorized, or subsequently ratified, purchased the materials furnished in the erection of the church building, were unobjectionable. But the sixth instruction given on the part of plaintiff, was erroneous. It was as follows: "The court further instructs the jury that if they find the account as stated in the petition, or any part of it, due plaintiff, then plaintiff has a lien on said building and lot for the amount found due."

This instruction, it will be at once perceived, tells the jury in effect, that if the defendants are indebted as alleged in the petition, a lien on the property therein mentioned is thereby created, regardless of the question whether the plaintiff had taken the proper steps to secure his lien in the time and manner prescribed by law. And the error I have pointed out, is not cured or rendered harmless, by anything contained in the other instructions which the court gave. The jury, indeed, were left in the dark on the point whether any inquiry was necessary in regard to plaintiff's complying with the statute in relation to the lien he sought to enforce. The same omission to instruct them in this particular, would not perhaps have been fatal; but, when in addition to ignoring this essential point, and passing it over in silence, they are directly told that a lien exists if indebtedness is proven, the only conceivable effect would be to exclude from their consideration as unworthy of attention, all evidence touching the matter to which I have referred. (Williams vs. Porter, 51 Mo., 441.)

Certain defects have been adverted to in the petition as a reason why the motion in arrest should have prevailed; but it is thought that the defendants by pleading to the merits, waived any objection which they otherwise might have successfully urged against the formal sufficiency of the petition.

The only material error observed, is the one already noticed, and for this the judgment must be reversed, and the cause remanded; the other judges concur.

AMOS LADD, Respondent, *vs.* L. C. SHIPPIE, *et al.*, Appellants.

1. *Sheriff's sales—Notice—Time of sale—Innocent purchaser.*—Real estate sold on execution, must be sold at the time and place announced in the notice given for such sale, and the sale cannot be postponed to another day by order of court, without a new notice; and when a sale is so postponed, the purchaser is not protected by his good faith, if the want of notice or defect of notice appears on the face of the sheriff's deed.

Appeal from Audrain Circuit Court.

G. B. Macfarlane, for Appellants.

I. The sheriff's deed was void upon its face and wholly inoperative to pass any interest defendant, Willingham, had in the lot. The statute required the deed to recite the names of the parties to the execution, the date when issued, the date of the judgment, order or decree and other particulars as recited in the execution; also a description of the propererty, the time, place and manner of sale. (R. S., 1835, § 45, p. 259.)

II. The deed fails to recite the names of the parties to the execution; that the sale took place between the hours prescribed by the law; that the sale was for cash; or that the purchaser was the highest bidder. (Rorer Jud'l Sales, 658; Piel vs. Brayer, 30 Ind., 332; Stewart vs. Huston, 25 Ark., 311; Tanner vs. Stine, 18 Mo., 583; Curd vs. Lackland, 49 Mo., 454; Wack vs. Stephenson, 54 Mo., 485; Lackey vs. Lubke, 36 Mo., 121.)

III. It appears from the deed that the sale was made upon a day unauthorized by law. (R. S., 1835, § 38, 39; McCormack vs. Fitzmorris, 39 Mo., 32; Buchanan vs. Tracy, 45 Mo., 442; Merchant's Bank vs. Evans, 51 Mo., 345.)

IV. The purchaser at sheriff's sale must look to the judgment, the execution, the levy, and the deed; as to them the rule *caveat emptor* applies. (Bank State Mo. vs. Bray, 37 Mo., 195; Lenox vs. Clark, 52 Mo., 115; Rorer Jud'l Sales, 589; Wheaton vs. Sexton, 4 Wheat., 503; Brooks vs. Rooney, 11 Georg., 423; Phillips vs. Coffee, 17 Ills., 154.)

Craddock & Musick, for Respondent.

Vories, Judge, delivered the opinion of the court.

This was an action of ejectment originally brought against defendant, Shippie, to recover possession of lot one in block eight, in the city of Mexico, in Audrain county.

The petition was in the usual form. The defendant, Shippie, appeared and filed his answer, denying the allegations of the petition. The defendant, Smith, afterward appeared, and on his own application was made a party defendant, and filed an answer in which he claimed title to the lot sued for, averring that his co-defendant was in possession thereof as his tenant, and also denying the facts in the petition.

In June, 1874, a trial of the case was had before a jury. It was admitted by both parties that they claimed title to the lot in question from James Smith, who was the common source of title. The plaintiff offered evidence on his part which tended to prove that James H. Smith had sold and conveyed the premises to one John Willingham.

The plaintiff next offered in evidence a deed dated the 28th day of July, 1841, made by the sheriff of Audrain county, and purporting to convey the interest of said John Willingham and others in the land in controversy to one William Bybee. This deed was objected to by the defendant upon the ground that the deed was void upon its face, for the reason that it was shown by its recitals that the sale of the lot was made at a time not authorized by law, and that it failed to show that the sale was made in the manner required by law. These objections were overruled, and the deed read and the defendants excepted.

The plaintiff then offered evidence tending to prove that William Bybee died intestate in the year 1852, leaving six heirs, and that by death and conveyances five-sixths of the premises in controversy became vested in William Bybee, Garland Bybee, James Bybee and Elizabeth Hagan, the wife of William L. Hagan; the said Elizabeth being the owner of one-sixth interest in the premises.

Plaintiff then read in evidence a quit-claim deed, dated in 1852, conveying the interest of James Bybee to William Bybee, and offered to read a quit-claim deed from Elizabeth Hagan and her husband, William L. Hagan, conveying their interest in said land to Garland Bybee. This deed was ob-

jected to by the defendants on the ground that the acknowledgment of said deed was defective, which rendered the deed ineffectual to convey the premises. The court overruled the objection and admitted the deed, and defendants excepted.

The plaintiff also read in evidence deeds from William and Garland Bybee to plaintiff for the land in controversy, and closed in evidence.

The defendants on their part introduced evidence tending to prove: 1st—that James Smith, who was the common source of title to the lot in controversy, died intestate in the year 1846, and that they derived title from his heirs; 2nd—they introduced a judgment rendered in the Audrain Circuit Court dated July 2, 1839, wherein Charles A. Day was plaintiff and Thomas D. Kilgore and Thomas Kilgore were defendants to the action; but the judgment, having been rendered in a case appealed from a justice of the peace, was rendered against said defendants, and also against Isham T. W. Kilgore and John Willingham, securities in the appeal bond, the judgment being for $44.25 and costs, and being the same judgment recited in the sheriff's deed read by plaintiff; 3rd—the defendants then read in evidence four executions which purported to have been issued on said judgment, as follows:

1st.—An execution issued on the 27th day of January, 1840, which recites the judgment and the parties thereto correctly, and commands the sheriff, as he has before been commanded, that of the goods and chattels and real estate of said defendants he cause to be made, etc. This execution was returnable on the first Monday of March, 1840, and the return thereon shows a levy on two town lots (neither of which is the one in controversy), and that the same were not sold for want of bidders.

2nd.—An execution issued on the 11th of June, 1840, which is in the usual form, takes no notice of the former executions or the levies thereunder, and was returnable on the first Monday of July, 1840. The following return is indorsed thereon by the sheriff: "This execution came to hand on the 11th day of June, 1840. Lot 6 in block 13, lot 1 in block

8; nothing bid for said property. This 7th day of July, 1840."

3rd.—An execution dated the 14th November, 1840. This execution is simply a *venditioni exponas*. It recites a judgment of the proper date and amount recovered by Chas. A. Day against "Thomas D. Kilgore and Thomas Kilgore and John Willingham, their security in the appeal bond," omitting the name of Isham T.W. Kilgore as one of the defendants. It also recites that, on the 11th day of June, 1840, command was given to the then sheriff of said county that of the goods, etc., of the said Thomas D. Kilgore, Thomas Kilgore and John Willingham, their security in the appeal bond, in said county, he cause to be made, etc., which writ was levied on lot 6 in block 13, and lot 1 in block 8, in the city of Mexico, *the real estate of the said Thos. D. Kilgore and Thomas Kilgore*, to satisfy said judgment, etc., and that said real estate remained unsold for want of bidders. The sheriff, after this recital, is commanded to expose the property so levied on by the previous writ to sale, and make return to the court, etc. This last writ was returned without a sale of the property, no court having been held at the time fixed for the sale.

4th.—Another writ of *venditioni exponas* issued on the 27th day of May, 1841, returnable to the July term, 1841, of said court. This writ recites the judgment just as it is recited in the last preceding writ, and then states that on the 14th day of November, 1840, command was given to the then acting sheriff that of the goods and chattels and real estate of the three defendants named he should cause to be made, etc., and that said sheriff had returned said writ indorsed thereon that it had been levied on the lots named, the *real estate of the said Thomas D. Kilgore and Thomas Kilgore* to satisfy said writ, and which real estate remains unsold, etc. The writ then states that, "Therefore, you are commanded to expose the property so levied on to sale," and concludes in the usual form. The return to this last writ shows that the two lots were sold for the sum of $2.25, but fails to show to whom the sale was made.

The foregoing was all of the evidence in the case. The court then, at the instance of the plaintiff, instructed the jury that the sheriff's deed read in evidence vested any interest that John Willingham had in the land in controversy in William Bybee, and that the deed of said Elizabeth and her husband vested all of the interest of Elizabeth in said land.

The defendant objected to said instruction and excepted.

There were a number of other instructions given and refused, which need not be noticed here.

The jury found for the plaintiff as to five-sixths of the lot in controversy, and judgment was rendered accordingly.

After an unsuccessful motion for a new trial, the defendants appealed to this court. There are two questions presented to this court by the appellant for consideration, which grow out of the admission of the sheriff's deed to William Bybee, and the deed of Elizabeth Hagan and her husband to Garland Bybee, in evidence by the court, and the instructions given by the court, as to the validity and effect of said deeds.

There are several objections made to the deed from the sheriff to William Bybee, some of which grow out of a variance between the executions or writs, under the judgment upon which they were issued, and others growing out of a variance between the writs under which the levy and sale were made and the recitals in the deed. And it is also objected that the deed is void on its face from its own recitals. The irregularities in the different executions issued on the judgment, and under which the levy and sale were made, were generally technical, and need not be discussed for the purposes of this case. The recitals in the deed as to the advertisement and sale of the land in controversy are as follows: "And whereas, said town lots were advertised for sale by me, said sheriff, by six hand-bills signed by myself, and put up at least twenty days before the day of sale, and exposed to sale at public vendue before the court-house door in said county of Audrain, on the 28th day of July, A. D. 1841, while said Circuit Court was in session, it being the

next day after the day set for sale in said hand-bills, being an order made by said court to adjourn said sale until next day, and there being a proclamation made at the door of said court house to that effect by said sheriff, and the said land or lots being struck off to the said William Bybee, for the sum of $2.18, he became the purchaser thereof. Now, therefore, etc."

It is contended by the defendant that the land having been sold on a day different from the day for which it had been advertised, as appears from the recitals in the deed, the sheriff's deed is therefore void and conveys no title to the purchaser. By the 38th and 39th sections of the act of 1835 to regulate executions (Revised Statutes of 1835) which was the law in force at the time of this sale, it is provided as follows:

"Sec. 38. When real estate be taken in execution by any officer, it shall be his duty to expose the same to sale, at the court-house door, on some day during the term of the Circuit Court of the county, where the same is situated, having previously given twenty days' notice of the time and place of sale, and what real estate is to be sold, and where situated, by at least six hand-bills, signed by him and put up in public places in different parts of the county, or by advertisement in some newspaper printed in the county."

"Sec. 39. All property taken in execution by any officer shall be exposed to sale on the day for which it is advertised, between the hours of 9 in the forenoon and 5 of the afternoon, publicly, by auction, for ready money, and the highest bidder shall be the purchaser."

There is a further provision made for a re-sale of property where the first purchaser shall fail to pay the purchase money. It appears from the recitals in the deed in question that the lots were not sold on the day for which they were advertised, but that the sale was postponed until the next day by an order of the court, and by proclamation of the sheriff. It does not appear at whose motion the sale was postponed by the court, or that either party was present consenting thereto; nor does it appear at what particular time the proclamation was made at the court-house door. It seems

to me that it would be a very dangerous precedent to hold that a sale might be postponed in this way; it would open the door for abuse. The statute plainly requires that the sale shall be made on the day for which the land is advertised, and to hold the notice good in this case would be clearly to disregard the statute. (Patton vs. Stewart, 26 Ind., 395, and cases there cited.) There may be cases found where it is held that an officer has the power to postpone a sale, but I apprehend that such cases will be found to have been controlled by statutes radically different from ours. It has been held by this court that where a purchaser at sheriff's sale fails to pay the purchase money, the sheriff may make another sale of the property without a re-advertisement; but the right to do so is placed on the particular reading of the statute authorizing such sale.

It is, however, insisted that Bybee, being an innocent purchaser, without notice of the irregularity of the sale, will not be affected thereby, and his title under the purchase will be complete. This is very true that where a stranger to the judgment and proceedings is the purchaser in good faith without notice, he will not be affected by any irregularity in the notice, but this rule does not apply where the defect in the notice or want of notice appears on the face of the sheriff's deed. The rule is that a purchaser at sheriff's sale must rely on the judgment, execution, the levy and the deed; if he can show an authorized execution and deed, a correct levy and notice may be presumed. (Rorer Judicial Sales, 589; Curd vs. Lackland, 49 Mo., 451; Draper vs. Bryson, 17 Mo., 71; Buchanan vs. Tracy, 45 Mo., 437; Lenox vs. Clark, 52 Mo., 115.)

But it is otherwise where the defects appear by the recitals in the sheriff's deed. (Merchant's Bank of Missouri vs. Evans, 51 Mo., 335; Jackson vs. Magruder, *Id.*, 55; Wilhite vs. Wilhite, 53 Mo., 71.) In the case of Buchanan vs. Tracy, just referred to, it was shown by the evidence that the sale was actually made on the day for which the land was advertised. This, it was held, explained and cured the mis-recital

in the deed. It follows that, as the defect in the notice, or the want of notice, in the present case, appears in the recitals of the deed, the purchaser is bound by them, and the deed will confer no title. The deed was, therefore, improperly received in evidence, and the instruction given by the court as to its effect was improperly given. It would be wholly useless to discuss the sufficiency of the deed from Elizabeth Hagan and her husband. The sheriff's deed having been held bad, she would have no title to convey, and the sufficiency of her deed need not be brought in question.

The judgment will be reversed and the cause remanded; the other judges concur.

GEORGE POMEROY, Respondent, *vs.* WM. H. BENTON, Appellant.

1. *Equity—Partnership—Fraud—Misrepresentations or concealment between partners—Pleading—Sufficiency—Relief—Vigilance.*—Where one member of a firm who had the entire management of the partnership, without the knowledge or consent of his co-partner used the money, assets and credit of the concern in outside speculations, and appropriated the benefits to himself individually, and subsequently rendered to his co-partner a false balance sheet, purporting to correctly exhibit the true condition of the firm affairs, but which in fact did not mention or allude to the outside operations, and assured his co-partner that this statement was correct, and on the faith of this statement and his representations his partner was induced to convey to him all his interest in the concern, and to execute a bill of sale therefor, which though not mentioning the profits of the said outside operations, was in form sufficiently broad to cover them, *Held:*

1st. That a petition setting forth the above facts and concluding with a prayer for a re-opening of the settlement and a prayer for general relief, stated a cause of action; and the prayer for general relief authorized any relief consistent with the facts alleged.

2nd. That it was no excuse or defense that the co-partner might have discovered the wrong, and prevented its accomplishment, had he exercised watchfulness. Lack of vigilance only serves as a defense where the party being apprised of, slumbers upon his rights.

2. *Partnership—Outside ventures by one partner, with partnership funds.*—Outside of any stipulations in the partnership articles, good faith should restrain

one partner from embarking the funds or credit of the firm outside of their legitimate scope, and for his own advantage; and if such ventures are made by one partner, he cannot appropriate the profits to himself, but must account for them to the partnership.

3. *Partnership—Agency—Responsibility between partners.*—Every partner is the agent of his co-partner, and the same rules and tests are applied to the conduct of partners, as are ordinarily applicable to that of trustees.

4. *Fraud—Misrepresentations—Ignorance of facts.*—It is not material whether or not the person making false representations upon which another acts to his own disadvantage knows them to be false; the assertion to the injury of another, of something not known to be true, is equally reprehensible, in law as in morals, with the assertion of that known to be false.

5. *Practice, civil—Pleading—Petition—Sufficiency of allegations of—Objections when must be taken.*—Under our code (2 Wagn. Stat., 1012, § 1; 1015, § 10), if a petition, however inartificially drawn, do but state a cause of action and no objections are taken to the formal sufficiency of the allegations either by demurrer or answer, the defendant is deemed to have waived all such objections.

6. *Equity—Fraud—Contracts—Construction of.*—A Court of Equity looks not so much at the legal formalities with which a transaction is clothed as to its very pith and substance; and where a contract is in form broad enough to cover many things not in terms expressed upon its face, but it is manifest that the minds of the parties never met and concurred in reference to these matters, and where fraud has been practiced, equity will disregard mere technical forms and only attach to the contract the effect which both parties had in view at the time of its execution and delivery.

Appeal from St. Louis Circuit Court.

Samuel Knox, Sharp & Broadhead, and Glover & Shepley, for Appellant.

I. A partner who improperly uses the money of the firm (and money raised by using the name of the firm, is money of the firm as much as any other) shall pay interest on the misused money and account for any profits derived from its use. (Glossington vs. Waters, 1 Sim. and St., 124; Stoughton vs. Lynch, 1 Johns. Ch., 467; Long vs. Majestre, 1 Johns. Ch., 305; 3d Kent. 5th Ed., 51; Collyer on Part., §§ 184, 185, 186, 221, 249; Somerville vs. McKay, 16 Vesey, 282.)

II. If defendant destroys testimony to prevent its use against him, the law furnishes a stringent rule to deal with the case. All things are presumed against the spoliator. When a party to a suit has testimony in his possession which

he will not produce, all things are presumed against him. (1 Taylor, Ev., 96, 97.) The court held that the finder of a lost jewel, who would not produce it, should pay the highest value of a jewel of its kind. (Armory vs. Delamore, 1 Strange, 505.) Where defendant had suppressed a will, but the contents were not precisely shown, the court presumed it to be as alleged, and entered a decree for the estate until it was produced. (Daulston vs. Cotesworth, 1 P. W., 731.) If a man destroys a thing designed to be evidence against him, a small matter will supply it. (1 Lord Raymond, 731.) When a party withholds evidence, and the secondary evidence is uncertain as to dates or sums, or boundaries, etc., every intendment shall be against the withholder. (7 Wend., 31.) A witness was put on the stand to prove the course and distance in a deed that was withheld by the other party, and the witness failed to make the proof clearly. The court said they would presume the fact to be as alleged. (18 Johns., 351.) The jurisdiction in case of spoliation has gone a long way. "To such a length I should have difficulty in following, if not bound by authority and precedent. To say that once you prove spoliation you may take it for granted that the thing spoliated was what it is alleged it was, may be going a great length in many cases." (Baker vs. Roy, 2 Russ. Ch., 73.)

III. The settlement was procured by fraud, and not binding, the profits on vouchers and whisky were not embraced in it, and not in contemplation of Pomeroy when he sold, and were, therefore, in equitable consideration, not paid for by Benton—not sold to him in equity—though in form they were. Mr. Pomeroy under the law had his choice either to rescind, disaffirming the sale, or to affirm the sale and have his damages.

1st. He was not bound by law or equity to rescind the sale if he was betrayed by Benton, through fraudulent representations, into a settlement of his accounts on a false basis, and afterwards made a sale of his interest on the basis of that settlement, but had the right to affirm the sale and claim his damages. When a party has been deceived by fraudulent

representations and thus led into a contract, he may affirm the contract and recover damages for the fraud. (Fenimore vs. U. S., 3 Dallas, 357; Culver vs. Avery, 7 Wend., 380; Taylor vs. Tillotston, 16 Wend., 494.) If the party affirm the sale, that takes away the right to rescind and leaves him only the right to recover such damages as he sustained by the fraud. (Whitney vs. Allaine, 4 Denio, 554; Kellogg vs Denslow, 14 Conn., 411; Boorman vs. Johnston, 12 Wend., 556; Waring vs. Mason, 18 Wend., 426; Holland vs. Anderson, 38 Mo., 55.) If a settlement is made between partners, and on faith of that settlement one pays the other more than his due, the sum overpaid may be recovered back by an action of assumpsit. (Bond vs. Hays, 12 Mass., 34.)

2nd. A party situated as Mr. Pomeroy was might have rescinded, undoubtedly; but to have had rescision he should have asked for it, and should also have shown the property on hand and not changed in condition; and that all parties could be put in *statu quo.* (Carrol vs. Rice, Walker, Ch., 373.) When such facts do not appear, rescision is impossible, and compensation is all the remedy a plaintiff can have. The defendant makes no allegation that the rescision is possible, or that the thing sold remained in *statu quo.*

3rd. In this case Mr. Pomeroy prays to have the settlement based on the false balance sheet held fraudulent; but does not ask to rescind the sale, and could not have rescision if he did ask it, for the sale was of a stock of dry goods, delivered two years and more before the fraud was discovered, and there is no showing that they had not all been sold long before the petition was filed. (Bradbury vs. Keas, 4 J. J. M., 446.) There can be no rescision unless parties can be put in *statu quo.* (Pintard vs. Martin, S. & M. Ch. 126; Golden vs. Maupin, 2 J. J. M., 239; 2 Story, Cont., p. 550, § 977.) Such a stock of goods and assets could not remain in *statu quo.* The plaintiff, therefore, has in law and equity a remedy for this fraud. The law will compel a fraudulent vendee, to compensate for the injury he has done.

IV. It has been suggested, if we are not mistaken, that the present petition is a suit in equity; and that the plaintiff should have sued at law. What did the learned counsel mean by a suit in equity? What alteration should be made in the petition to make it acceptable as a petition at law? Our Code, ch. 161, Gen. Stat., 1865, says: "There shall be in this State but one form of action." In that form of action the plaintiff states his facts. The legal inevitable consequence is, that if the facts which give a cause of action are stated, the proper relief must be given, no matter whether it is legal or equitable. If the petition of Pomeroy states facts that affirm this fraudulent sale, that is,do not disaffirm it, and prays for damages in proper terms, the petition is all right. This is the sense of the code, and this is the course of adjudication upon it. The code abolished all rules of pleading which were merely technical; none remain but such as truth and justice require. (Cobb vs. West, 4 Duer., 38; Haight vs. Child, 34 Barb., 186; Scott vs. Pilkington, 15 Abbot, Pr., 280; Butterworth vs. O'Brien, 24 How. Pr., 438; Winterton vs. 8th Avenue R. R., 2 Hilton, 389; 15 Abbott, 445; Durant vs. Gardner, 19 How. Pr., 94; Marquat vs. Marquat, 2 Kernan, 336.) The plaintiff is entitled to any relief, legal or equitable, which arises on the facts of his petition. (Charless vs. Rankin, 19 Mo., 490.) In any event, as the defendant has not pleaded remedy at law, the court will go forward and render judgment on any cause of action, legal or equitable. (Underhill vs. Van Courtland, 2 Johns. Ch., 369; Ludlow vs. Simond, 2 Caines' Cases, 40; Livingston vs. Livingston, 4 Johns. Ch., 290; Grander vs. Leroy, 2 Paige, 509; Hawley vs. Cramer, 4 Cow., 727; Leroy vs. Pratt, 4 Paige, 81; Burrough vs. McNeil, 2 Dev. & Bat. Eq., 300; Cable vs. Martin, 1 How. Miss., 561; Davis vs. Roberts, 1 Sm. & M. Ch., 550; Holmes vs. Doll, Clark R., 75.) This case shows how the defense must be set up. (Osgood vs. Brown, 1 Freeman, Ch., 392; Miller vs. Furze, 1 Bailey, Eq., 187; Mays vs. Taylor, 7 Geo., 244; May vs. Goodman, 27 Geo., 353; Fowler vs. Halbart, 3 Bibb, 384; Supervisors, etc vs. Utica, etc., 1 Barb. Ch., 343.) The chancellor said he had

not considered if the claim was legal or equitabe, as there was no such defense. (Viburt vs. Trait, 3 Abbott, Pr., 119; 6 Abbott, Pr., 6; 4 Paige, 400.) The same doctrine prevailed in Missouri, till lately. (Oldham vs. Trimble, 15 Mo., 229; Black vs. Chase, 15 Mo., 347; Martin vs. Greene, 10 Mo., 652.) But there is in matters of fraud, a concurrent jurisdiction both in law and equity.

To resume then, our conclusions are these: That the plaintiff has been wronged, and must have some sort of redress from the court. Originally he might have demanded rescision or damages. He is not entitled to rescision now, he did not come soon enough, nor till the condition of the property had changed, and the property had been disposed of. It is, therefore, compensation or nothing. The law allows plaintiff to affirm the contract and recover damages. There is nothing in the form of plaintiff's action to prevent his recovery. The plaintiff not being obliged to rescind the outstanding sale or bill of sale unannulled, is no defense, the plaintiff's petition is not a bill in equity; but if it were, the defense remedy at law cannot be set up now, because (1) it is abolished, (2) it is not pleaded.

Cline, Jamison & Day, and John M. Krum, for Respondent.

I. The bill of sale is plain and simple, couched in comprehensive language, and as a legal instrument remains a complete barrier, both at law and in equity, to any action that may be instituted by the appellant against the respondent, unless it first be set aside in a direct proceeding by a court of competent jurisdiction.

It can neither be surcharged nor falsified; if it be voidable on the ground of fraud, it must be avoided in *toto*. It cannot be affirmed in part and avoided in part. It was a lumping bargain and not a sale of Mr. Pomeroy's interest in any particular chattel or land, or of his interest in any particular sum or balance.

The instrument must speak for itself. It applies the consideration to the entire interest sold, and does not pretend to distribute or apportion it among the various rights assigned; its scope and operation can neither be limited or extended by oral proof. There can be no doubt but that it conveys every right of appellant growing out of said firms to respondent, including those claimed in this suit, as well as all others, and as he has not seen fit to place it in the power of the court to set aside or annul the sale and restore the parties to their original positions in these firms, it stands as a legal bar to the prayer in the bill. Equity will not assist the appellant to annul this sale for the purpose of getting an interest in the gains and profits of the whisky and voucher adventures alleged in the bill to be firm transactions, and at the same time, affirm the sale for the purpose of retaining the consideration of two hundred and seventy-five thousand dollars already paid to him by the respondent. Nor can he avoid the universal, inflexible and inexorable rule of equity by calling the sale a settlement. The instrument is before the court and speaks for itself. Its legal character can be tried by inspection. It requires no christening to give it a name. This it received at its conception and birth. It came into life pronouncing its own name. Any one who reads it cannot fail to see that it is a bill of sale and not a settlement, as claimed by the counsel for the appellant.

II. Now, if this sale be voidable on the ground of fraud, on proper application, the remedy a court of chancery would afford would be to place the parties in the same condition they were in before it was made. (Brown vs. Lamphear, 35 Vt., 252; Chase vs. Garvin, 19 Me., 211; Skilbeck vs. Hilton, L. R., 1866, 2 Eq., 587.) If, for example, a bill be filed by the obligor of an usurious bond, to be relieved against it, the court in a proper case will cancel the bond, but only on his refunding the money advanced. The equity is to have the entire transaction cancelled, and if the party complaining will have equity, he must do equity. (Daniel vs. Mitchell, 1 Story, 173; Hardy vs. Handy, 11 Wheat., 103; Driver vs. Fortner,

5 Porto, 9; Brodgen vs. Walker, 2 Har. and John, 285; Waters vs. Lemon, 4 Hamm., 229; Lowey vs. Cox, 2 Dana, 469; White vs. Trotter, 14 Sm. and M., 30; Bruen vs. Hone, 2 Barb. S. C., 586; Doggett vs. Slade, 7 Blackf., 128; Hill vs. Hill, 3 H. Lords, Cas., 828.) The Court of Equity will remit both parties to their original position, and will not relieve the complainant, leaving him the fruits of the transaction of which he complains. (Harrison vs. Keating, 4 Hare, 1-6; Skilbeck vs. Hilton, L. R. 2 Eq., 587; Jarrett vs. Morton, 44 Mo., 275; Boyne vs. Vivian, 5 Ves., 604.)

III. It cannot be claimed that this is a bill to set aside the sale. If this be attempted on the part of the plaintiff, the rule of pleading will prevent it; as it is universally held that no relief can be granted under the general prayer, that is contrary to the theory of the bill or inconsistent with the special prayer. This is a bill to surcharge and falsify accounts. Six particular matters of omissions are specified for surcharging, and the court is called on to open the accounts of Pomeroy & Benton, and to permit the plaintiff to surcharge as to these matters only, thus limiting the general prayer to all other and further relief, that the plaintiff might be entitled to or in any way growing out of his special prayer to open the accounts, as to those particular matters set forth in the bill, and to none other. No relief can be granted under a general prayer entirely distinct from and independent of the special relief prayed. (Thompson vs. Smithson, 7 Porter, 144: Foster vs Cook, 1 Hawks, 509; Chalmers vs. Chambers, 6 H. and J., 29; Sheppard vs. Starke, 3 Munf. 29; Butler vs. Durham, 2 Kelley, 414; Chapman vs. Chapman, 3 Beas., 308; Dunnock vs. Dunnock, 3 Md. Ch., 140; Thomas vs. Ellmaker, 1 Parsons' Eq., 99.)

IV. As this is claimed to be a bill to set aside a settlement in particular matters specified, and as it has turned out on trial that there was no settlement, then there is no equity in the bill.

V. If there was a settlement, and afterwards appellant sold out his interest in these firms to the respondent, as shown by

the bill of sale read in evidence, then appellant has no equity in his bill, for even though they may have had many partial or complete settlements during the existence of these firms, yet, if the appellant sold all his interest in the assets of the firms to the respondent, it matters not how many errors or how much fraud has been committed in these various settlements, as its discovery by bill can in no wise afford any relief to the party injured by the mistake or fraud, unless the sale be annulled.

VI. If it be shown that matters should have entered into these settlements that were omitted, it does in no sense show that all right thereto did not pass by the bill of sale; and if it be not rescinded, what equity has the plaintiff against the settlement? Suppose the settlement be surcharged and falsified, does not the bill of sale, so long as it remains unrescinded, continue to vest every right, interest and claim pertaining to or growing out of the surcharged settlement, in the respondent in like manner as it did before the settlement was disturbed? Then what has been gained by this useless ceremony, as the title to the property has passed to the respondent by an undisturbed sale, and the appellant has lost thereby all right or equity to have the settlement, if there was one, disturbed so long as the sale continues to stand? In short, the only means the appellant has to reach any supposed error in any supposed settlement would be to file a bill to set aside the sale, and unless his equities be sufficient for this purpose, then he must be forever barred.

VII. If the appellant had filed a bill to set aside the sale on the ground set up in this petition to *surcharge* the accounts and alleged settlement, and respondent had not seen fit to join in the prayer to have the sale rescinded and to be restored to the position he was in before the purchase was made, he would have been at liberty, by answer in the nature of a cross-bill, to have set up all these matters in his defense of the sale, or, after the sale was set aside, to have brought them forward in the adjustment of the partnership accounts: all of which the appellant has endeavored to avoid by attempting to

affirm the sale and at the same time go behind it. He attempts to use the sale as a shield to guard himself against the right of the respondent to call him to account for the gains he has made out of the money he drew from the firm, and at the same time he disregards it when it stands in the way of his own interest, or would defeat his claim that respondent's private gains should be declared firm profits.

The respondent could not plead his defenses by way of cross-bill so long as the appellant affirmed the sale.

VIII. As long as the sale remains unimpeached it stands as a barrier between the parties; neither can claim relief unless it be first removed out of the way, as a bill can confer no jurisdiction upon a court of equity by a prayer to discover that upon which no court could grant relief.

On this point, both parties must be placed on the same footing. (Gallatin vs. Erwin, Hop. 48; S. C., in 8 Cowan, 361; May vs. Armstrong, 3 J. J. Mar., 262; Daniel vs. Morrison's Executors, 6 Dana, 186; Fletcher vs. Wilson, 1 S. & M. Chy., 376; Draper vs. Gordon, 4 Sanf. Chy. R., 210; Josey vs. Rogers, 13 Ga., 478; Slason vs. Wright, 14 Vt., 208; Rutland vs. Page, 34 Vt., 181; Cross vs. DeValle, 11 Wallace S. C., 14; Hurd vs. Case, 32 Ill., 45.)

IX. Take this case in another point of view, and suppose it to be an attempt to annul the sale in part and to affirm it in part.

This cannot be done in this or any other case. (Hill Sales, 306; Allen vs. Edgerton, 3 Vt., 445.)

X. Plaintiff must first do equity before the court will give him equity, or even listen to his complaint.

The sale was not absolutely void, and if it be disturbed on the ground of fraud, all parties must be placed in the same situation they were in before the sale; and unless this can be done, it would be inequitable for the court to interfere or grant relief. And no case can more fully illustrate this rule of equity jurisprudence than the case at bar.

SHERWOOD, Judge, delivered the opinion of the court.

This was a suit in the nature of a bill in equity. The plaintiff and defendant were for a number of years co-partners, under the name and style of Pomeroy & Benton, engaged in the wholesale dry goods business, in the city of St. Louis, where the defendant resided and managed the business of the firm, while the plaintiff resided in the city of New York, attended to the affairs of the firm at that point, and seldom visited St. Louis.

The petition, in substance, charges that defendant, in violation of the articles of co-partnership and of his duty as partner, and without the knowledge or consent of plaintiff, used the money, credits and assets of the firm in the purchase of government vouchers and whisky, and in various other ways misappropriated the money, credits and property of the firm, whereby he realized immense profits; that he fraudulently omitted to charge any of these matters on the partnership books; that subsequently he forwarded to plaintiff a false balance-sheet, purporting to be a correct exhibit of the whole partnership affairs, but it in fact did not mention any of the speculations in which defendant had been engaged, or of the profits he had realized; that this balance-sheet, defendant, though knowing the contrary, assured plaintiff was correct; that by these representations, and other fraudulent conduct and contrivances, defendant induced the plaintiff, who relied solely on the defendant and his representations, to settle with him on the basis of the balance-sheet, and to sell out to him his entire interest in the firm for $275,000, a sum far below its real worth. The petitioner concludes with a prayer for opening the settlement and taking an account as to the matter complained of, and for general relief.

All the material allegations of the petition were denied by the answer, which also set up as new matter of defense, that defendant had purchased of plaintiff his entire interest in the firms of Pomeroy & Benton, Pomeroy, Benton & Co., Pomeroy, Durkee & Co., and Pomeroy & Durkee, for the sum of $275,000, and received a bill of sale therefor, whereby the

firm of Pomeroy & Benton was dissolved, and the entire interest of plaintiff in the goods, property and assets of that firm were conveyed and assigned to defendant, on the first day of January, 1865, and that plaintiff from that time forward had no further interest, right or claim in the firm of Pomeroy & Benton, or the other firms mentioned, and that plaintiff was thereby barred of having the relief prayed for, etc. There was no reply filed.

Laying aside for the present all inquiry as to the sufficiency of the petition and the effect to be given to the defendant's answer, what the evidence in the cause establishes will be briefly adverted to, and the questions of any practical importance necessarily arising therefrom stated and discussed.

Those questions are two, viz: First, did the defendant appropriate the credits or funds of the firm to his own private use in the purchase of government vouchers and whisky? Second, was such appropriation made without the consent & in fraud of the rights of the plaintiff?

I am forced to the conclusion, after a careful perusal of the evidence, that both these questions must receive a reply in the affirmative, as it is abundantly established by the testimony, that the defendant, prior to the dissolution of the firm, in contravention of the articles of co-partnership and of his duty as partner, appropriated its monies and credits to his own private use, in the purchase of vouchers and highwines, for which he never accounted, but on the contrary, induced the plaintiff to execute to him a bill of sale sufficiently comprehensive *in form* to embrace the former's entire interest in the firm; when the balance-sheet, which was used as the basis on which the sale was effected, made no mention of, and contained not the most distant allusion to the profits fraudulently realized by the defendant, and of which, as shown by the testimony, plaintiff was entirely unaware, reposing as he did in defendant and his representations the most implicit confidence. It is no excuse for, nor does it lie in the mouth of the defendant to aver, that plaintiff might have discovered the wrong and prevented its accomplishment, had he exercised

watchfulness, because this is but equivalent to saying: "*You trusted me, therefore I had the right to betray you.*" *Vigilantibus et non dormientibus equitas subvenit*, is without application here; it only applies where a party being apprised of, slumbers upon his rights. For the betrayal of confidence reposed, the skillful lulling to rest of the intended victim, the adroit closing of every avenue through which apprehension might enter—whether this be done by words or by "*expressive silence*,"—are the ear-marks of successful fraud the world over. And a court of equity, should it make such a perverse application of one of its fundamental maxims as that seemingly insisted on by defendant's counsel, would become the efficient ally of the *vigilant* wrong-doer, and prove recreant to its past history and the principles on which its very jurisdiction rests.

That the balance-sheet was the basis of the estimate of plaintiff's interest in the concern, is sufficiently clear, proven as it is by the testimony of plaintiff, as well as by defendant's admissions to Wilkerson. It is equally clear that the voucher and whisky transactions were not included in such estimate. These things defendant claimed and still claims as his own. It is not shown by the evidence, that the dealings in the trade-store at Natchez ever embraced transactions in vouchers or whisky; the defendant himself would not assert that they did; so that plaintiff's consent as to the operations at that point could afford no protection for defendant's conduct in regard to those matters. And besides, the defendant would not venture to deny what the plaintiff positively asserts, that he knew nothing of the whisky or voucher transactions of the defendant until long after the dissolution of the firm. Manifestly, plaintiff could not yield assent to nor waive that of which he was ignorant. Even if it be conceded for the sake of argument, that the defendant was permitted to withdraw from the capital of the firm a considerable sum for his own use, still this would by no means authorize the speculations into which he plunged; and this is apparent for several reasons:

First, the articles of co-partnership expressly forbade them. Second, the sums which defendant might have drawn for his individual use were far exceeded in amount by those really employed in such speculations. Third, it nowhere satisfactorily appears in evidence, that the amounts which could have been legitimately drawn, were ever actually embarked in those speculations. And, fourth, that good faith, which should be the animating principle of all mercantile associations, (all the authorities on partnership speak this language) should have restrained the defendant from embarking the funds or credit of the firm, outside of their legitimate scope and for his own individual benefit. For not only are gross frauds committed by one partner against another prohibited, but transactions of a more plausible nature, as intrigues for private advantage, are held as offenses against the partnership, equally forbidden, and therefore relievable in a court of equity. (Collyer on Part., § 179; Smith's Merc. Law, 54; Featherstonhaugh vs. Fenwick, 17 Vt., 298; Fawcett vs. Whitehouse, 1 Russ and Myl., 132; Russell vs. Austwich, 1 Sim., 52.)

It has accordingly been held that one partner is accountable in equity to his co-partner for his proportion of the profits of a venture, although *outside* of the firm's scope of business, if the money (or what is tantamount thereto, the credit) of the firm, is used in such venture. For, as Lord Eldon says: There is an implied obligation among partners, to use the property for the benefit of those whose property it is. (Crawshay vs. Collins, 15 Ves., 218; Brown vs. Litton, 1 P. Wm., 140; Stoughton vs. Lynch, 1 Johns. Ch., 467; Collyer on Part., § 182.)

So far has the rule which requires the utmost good faith between co-partners prevailed, that where a partner, in violation of the partnership articles, but *without* using the partnership funds therefor, embarks in outside enterprises, a court of equity will decree his co-partner as a partner with him in such separate business. (Collyer on Part., §§ 221-249; Somerville vs. McKay, 16 Ves., 382.) And a bill making such allegations has been held maintainable, and that an

account could be taken, although an action at law would lie for the breach of the articles.

At the trial the claim was seemingly urged by the defendant, that as in 1864, plaintiff was loaning out the firm's money at six or seven per cent. interest, and a considerable amount was also lying idle in bank at New York, that therefore there was no impropriety in his using the firm funds in St. Louis, being charged, as he states he gave strict directions to the book-keeper to do, with 8 per cent. interest on call. But unfortunately for this shallow pretense, evidently an afterthought, no charge against the defendant for interest (only a very inconsiderable sum) was ever made on the books of the firm, notwithstanding the large sums he was constantly using. Even, however, had he been charged with interest on every dollar he misappropriated, still this would not be enough; he must be held answerable as well for the *profits* he has derived out of the partnership funds. (Collyer on Part., § 182; Stoughton vs. Lynch, 1 Johns. Ch., 467; Brown vs. Litton, 1 P. Wms., 140; Sto. on Part., § 178; Herrick vs. Ames, 8 Bosw. 115.)

To such an extent have courts of equity gone in this direction, that if there be any doubt as to whom the funds in such case belong, that doubt will be resolved in favor of the partnership and they will be held as belonging thereto.

That every partner is the agent of his co-partner is a very familiar doctrine, and it arises from the necessities of the co-partnership relation. A doctrine equally well settled, though not yet hackneyed through frequent quotation, is, that *the same rules and tests are applied to the conduct of partners as are ordinarily applicable to that of trustees;* and that the duties, functions, rights and obligations of partners may be for the most part comprehended by the same words which define those of *trustees* and *agents.* (Collyer on Part., § 182; 1 Sto. Eq. Jur., §§ 468, 623; Kelly vs. Greenleaf, 3 Sto. R., 93.)

Mr. Justice Story, in his elaborate work on Equity Jurisprudence (Vol. 1, § 468), has remarked, in speaking of the duties of agents, as follows:

"Courts of equity adopt very enlarged views in regard to the rights and duties of agents, and in all cases where the duty of keeping regular accounts and vouchers is imposed upon them, they will take care that the omission to do so shall not be used as a means of escaping responsibility or of obtaining undue recompense.

* * * Upon similar grounds, an agent is bound to keep the property of his principal separate from his own; if he mixes it up with his own the whole will be taken, both at law and in equity, to be the property of his principal, until the agent puts the subject matter under such circumstances that it may be distinguished as satisfactorily as it might have been before the unauthorized mixture on his part. In other words, the agent is put to the necessity of showing clearly what part of the property belongs to him; and so far as he is unable to do this, it is treated as the property of his principal. Courts of equity do not in these cases proceed upon the notion that strict justice is done between the parties, but upon the ground that it is the only justice that can be done; and that it would be inequitable to suffer the fraud or negligence of the agent to prejudice the rights of his principal." At a subsequent period, in the case of Kelly vs. Greenleaf (3 Story Rep., 93) where a member of a firm had failed to keep proper books of account so that the firm property could be distinguished from his own, the learned judge cites the section just quoted with approval, and remarks with emphasis "Every word of this passage is equally applicable to the case of a partner acting as the agent of a partnership," and this was precisely the *status* of the defendant. Not only did the law imply, but his own express contract required, that he should see to it that the books of the firm were fairly and honestly kept, and this was especially the case as the plaintiff was acting for the firm in New York, while he had the personal management of the business in St. Louis, and nothing but a flagrant disregard of his partnership obligations could have induced him to so sadly neglect his duty in this particular and afterwards aggravate the wrong thus committed, by taking advantage of his culpable omission

and neglect. But he will not be permitted to employ his dereliction from duty "as a means of escaping responsibility" or of obtaining more than his proper proportion of the partnership effects.

What was the exact amount of the partnership funds which the defendant has converted to his own use, in the purchase of the articles referred to, is an inquiry which will probably never receive an answer in anywise approaching exactitude.

The defendant testifies that about $70,000 would reach his purchases in highwines; but the testimony of his brother-in-law, Sturgis, shows that in one single operation in Chicago he cleared about that amount. His operations in vouchers, he thought, would reach $200,000, but without any data to guide his recollection, he is positive they never reached half a million. He tells Catherwood he has cleared $25,000 on whisky under his contract with him, and gives him $5,000 as his share, and at a subsequent period does not deny that he owes him more; but when testifying he claims to have made only $19,377 on whisky and $26,460 on vouchers. But there is every reason to believe that these statements should not be regarded as importing absolute verity. Defendant indicates to George H. Chase, by means of some figures on a piece of paper, that he realized on whisky from $75,000 to $100,000—and he tells Catherwood that he had been engaged largely in the purchase of whisky, "but only as an agent," and that he stopped purchasing whisky, giving as a reason that "he was doing so well with the money in the purchase of vouchers, he preferred to buy them rather than risk it in whisky." And he tells Munson Beach that he paid for his house, $47,500, with money realized on vouchers. And the defendant's testimony shows that he paid for the vouchers which he purchased, by the checks of the firm, and never accounted for the profits.

The amount expended by defendant for vouchers, in the short space of time between August 1st, 1864 and the end of that year, as shown by Wilkerson's statement, was $271,058.25. As to how often the vouchers were turned into cash, whether

they usually remained on hand one day, one week, or one month, we are left totally in the dark—nothing elicited from the defendant throws any light on this subject; and the amount of his profits depend greatly upon the rapidity with which he could cash them, and reinvest their proceeds in other vouchers. And this alternation of purchase and sale would seem to have been the defendant's usual course of dealing when engaged in business of this description.

Whether the defendant knew that the balance-sheet furnished the plaintiff was incorrect, it is wholly immaterial now to inquire. For the assertion to the injury of another of something not known to be true, is equally reprehensible both in morals and law, as that which is known to be false. (1 Sto. Eq. Jur., § 193.) The defendant denies having asserted the correctness of the balance-sheet, but the seeming lack of candor he exhibits when testifying, the apparently evasive and contradictory replies he gives in response to questions propounded to him; his failure to satisfactorily answer whenever asked to tell of dates, amounts and other facts with which it would seem he must be familiar, render any statement he may make, open to very jealous observation.

But whether he made any such representations or not, does not at all affect his present liability. The relations of trust and confidence existing between the plaintiff and himself placed him under an equitable obligation to communicate all he knew, of the matter then pending, to the plaintiff, to "make a clean breast of it," to disclose to him all the material facts within his knowledge touching the negotiation then in progress as fully as though he had stepped upon the witness-stand and kissed the book, and nothing short of a complete disclosure of this sort could exonerate the defendant from the charge of undue concealment, which, under circumstances like the present, is, in the sense of a court of equity, itself a fraud. (1 Sto. Eq. Jur. §§ 204, 205, 207, 213, 214, 215, 216, 220; Bank of the Republic vs. Baxter, 31 Vt., 101; Martin vs. Greene, 10 Mo., 652; Jillett vs. U. N. Bk., 56 Mo., 304; Bruce vs. Ruler, 17 Eng. C. L., 290; Juzan vs. Toulmin, 9 Ala.,

662; Maddeford vs. Austwick, 1 Sim. 89, 8 B. and Cressw., 586. The doctrine here asserted, that confidence reposed, and the fullest disclosures are, in equity, correlative terms, is one in full accord with the authorities above mentioned and must commend itself to the cordial approval of every just mind, while it rebukes the manifestations of that spirit which, looking to its own advantage, is too prone to disregard the rights of those to whom it owes the fealty incident to intimate and confidential association.

In briefly commenting upon the evidence, I have hitherto omitted to make mention of that *wonderful book* in which defendant kept the accounts of his whisky operations, or of the peculiar and perilous vicissitudes through which it passed. At one time it was wholly consumed by fire; at another it met with only a partial destruction; but surviving all the destructive agencies arrayed against it, it is still extant, *except that portion which records defendant's transactions in whisky.*

It is simply impossible to review this portion of defendant's testimony and listen to his flimsy excuses and ever varying reasons in reference to this book, without being fully impressed with the idea that he destroyed that portion of it which he *did* destroy, for far more cogent reasons than any which he has yet seen fit to divulge. And this is made more especially apparent from the fact that the destroyed entries were not contained in any other book.

As the point has been referred to rather than pressed in argument, I will refrain from discussing the question whether the rule *in odium spoliatoris* is applicable to the facts of this case. The rule is certainly one of great stringency, and therefore should not be resorted to but in extreme cases, and where other means of proof fail.

Having thus considered the results properly deducible from the evidence, the sufficiency of the petition will next be discussed; and in reference to this, it may be observed that it states a *cause of action*, if fraud of the character charged therein and established by that evidence constitutes any ground

whatever for invoking remedial justice. And the petition concludes with a prayer for general relief which will authorize any relief consistent with the facts alleged. This was true under the *old* practice, and is more especially the case under the *new*.

As to whether the petition (if the bill of sale, while it stands, is to be regarded as an insuperable barrier to any relief) should have gone farther in its allegations, asked rescission of the contract and offered to surrender the $275,000, the consideration specified in the bill, as a condition precedent to having an account taken of the matter complained of, a ready and satisfactory reply is, that the petition passed unchallenged at the hands of the defendant, and it is rather late in the day, after he has pleaded to the merits and had a trial in which he enjoyed all the benefits which he could have had, even if the petition had been a model of perfection, for him to now come forward with the assertion that the petition is faulty in the particular referred to.

It is a fact, it would seem, not generally recognized, or at least, frequently ignored, that we have in this State, a *code*; that by that code are provided the forms of all pleadings, and the rules by which they are to be tested, (Wagn. Stat., 1012, § 1) and under the rules thus laid down in our practice act, if the petition, however inartificially drawn, do but state a cause of action, and no objections are taken to the formal sufficiency of its allegations, either by demurrer or by answer, "the defendant shall be deemed to have waived the same." (*Id.*, § 10, p. 1015.) "If the substantial averments are there and the adversary overlooks mere formal defects, his *statutory right* to indulge in critical objections is *swallowed up* in his *statutory waiver;* thenceforward he must address himself to the merits of the case." (Elfrank vs. Seiler, 54 Mo., 134; Russell vs. State Ins. Co., 55 Mo., 585.) And "if the allegations of the petition entitle the plaintiff to any measure of redress, a deaf ear will not be turned to his complaint, simply because he thinks justice should be dispensed to him in a particular way, other than and different from that to which he

is actually entitled." (Biddle vs. Ramsey, 52 Mo., 153.) And our legislature, as if determined, by "line upon line and precept upon precept," to inculcate a liberal construction of pleadings, has, in a subsequent chapter, given, among others, this additional mandate: "The court shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party." (Wagn. Stat., § 5, p. 1034.)

Now it is difficult to conceive in what way the "substantial rights" of the defendant could have been prejudicially affected by the failure of the petitioner to allege plaintiff's willingness to surrender the proceeds of the sale, conceding for the moment that such allegation was necessary. But this concession will not be made, and among others, for the reason that a court of equity looks not so much to the legal formalities with which a transaction is clothed, as to its *very pith and substance*. So that even if the bill of sale were broad enough *in form* to comprehend all the interests which the defendant claims it did, yet as it is conclusively manifest from the evidence, that the minds of the plaintiff and of the defendant never met and concurred in the sale of those matters of which the plaintiff was ignorant, and which the defendant concealed, equity, in consideration of the fraud practiced, and disregarding mere technical forms, will hold that nothing passed by the bill of sale, only such matters as both parties had in view at the time of its execution and delivery.

Thus, it has been held, if an instrument is so general in its terms as to release the rights of a party to property to which he was totally ignorant that he had any title, and which was not within the contemplation of the bargain at the time it was made—in such cases the instrument will be restrained to the purposes of the bargain and the release confined to the right intended to be released or extinguished. (Ramsden vs. Hylton, 2 Ves. Sr., 304; 1 Sto. Eq. Jur., § 145.)

But it is with no small degree of inconsistency that the defendant at one moment claims that the bill of sale, until set aside is a complete bar to plaintiff's action, because it pur-

ports to convey all of plaintiff's interest in the *partnership*; and then in the next vehemently asserts that the ventures in vouchers and whisky were *defendant's own individual speculations.*

For the reasons heretofore given, there existed no necessity for rescinding the sale, or that the present action should have been brought for that purpose, and with that theory in view. The evident object of the petition is to have an account taken as to those matters which were in reality *outside and independent* of the sale, although apparently embraced within its terms.

There was no new matter set up in defendant's answer, so that a reply was unnecessary. The answer only set forth the sale with greater formality than had been already done in the petition.

Judgment reversed and cause remanded, with directions to the court below to have an account taken in conformity to this opinion, and in thus taking the account the defendant is to be treated in all respects as a trustee. Judge Lewis not sitting; the other judges concur.

———o———

ANN FONTAINE, Plaintiff in Error *vs.* THE BOATMENS' SAVINGS INSTITUTION, Defendant in Error.

1. *Dower—Seizin of husband.*—Where the seizin of the husband is for a transitory instant only, as where the same act which gives him the estate also conveys it out of him, or where he is the mere conduit employed to pass the title to a third person, no right of dower attaches; and this principle also applies where the conveyance is effected by two deeds, provided they are delivered at the same time, because they take effect from delivery only.
2. *Conveyances—Execution—Acknowledgment—Delivery—Presumption.*—A deed is not generally executed until it is acknowledged, and till that takes place there is no presumption of delivery.
3. *Deeds—Consideration clause—Recital may be contradicted.*—The consideration clause in a deed has only the character and force of a receipt, and is always open to explanation or contradiction.

Error to St. Louis Circuit Court.

Dryden & Dryden, and M. Kinealy, for Plaintiff in Error.

I. Seizin in law of an estate of inheritance by the husband entitles the wife to dower. (1 Scrib. Dower, § 24, p. 251.)

It being admitted by the defendant, that at the date of the deed of 10th July, 1835, from Louis Provenchere and wife to Felix Fontaine, Provenchere was seized in fee of the ground demanded, that deed was sufficient in law to transfer a like estate and seizin of the premises in dispute to Fontaine the grantee. The seizin given by the deed was at least *prima facie* such as would entitle the wife of the grantee to dower.

Beneficial seizin for an instant entitles the widow to dower at common law. (1 Scrib. Dower, 266; Stanwood vs. Dunning, 14 Me., 290; Holbrook vs. Finney, 4 Mass., 567; Tevis vs. Steele, 4 Mon., 239; Griggs vs. Smith, 7 Hal., 22; Nash vs. Preston, 3 Cro. R., 190.)

II. It is however insisted by the defendant that Fontaine's seizin was merely transitory and not a beneficial seizin. Seizin is transitory where the same act or instrument which gives the grantee the estate conveys it away from him or deprives him of it.

If Fontaine's seizin was but transitory, as is insisted, it is matter of defense, and the burden of proving it, and of thus overturning the plaintiff's *prima facie* case, rests upon the defendant. (1 Washb. Real Prop., side p. 177, Sub. 10; Grant vs. Dodge, 43 Me., 489.)

III. The law raises no presumption of mere transitory seizin, in this case.

1st. A deed having been shown to have been delivered, in the absence of proof to the contrary the law presumes it to have been delivered on the day of its date. (Caldwell vs. Garner, 31 Mo., 134; 6 Peters, 124; 14 Pet., 322; 4 East., 477; 5 B. and Ald., 902.) Under this principle the deed to Fontaine was delivered one day before the delivery of the one from him, and therefore his seizin was neither transitory nor instantaneous.

2nd. *Prima facie* the deed to Fontaine was founded upon the consideration expressed in it; if it was founded upon the consideration expressed in it, then the two deeds were not parts of one and the same transaction, but were separate and distinct. (Moore vs. Rollins, 45 Me., 494; Gilliam vs. Moore, 4 Leigh, 32; Jackson vs. Dunsbaugh, 1 Johns. Cases, 95.)

IV. The deposition of Mrs. Fontaine was inadmissible because: 1st. It really proves nothing relevant save what stands admitted: 2d. It was offered for the purpose of showing that Fontaine, the husband, took the conveyance from Provenchere as a trustee. It is therefore an attempt to prove the existence of a trust created by express contract, concerning lands, by parol testimony. As no fraud, or fraudulent or other representations of Fontaine are alleged or proved, the trust, if any, is within the Statute of Frauds and parol evidence is inadmissible. (Brown Frauds, §§ 94, 95; Chiles vs. Woodson, 4 Bibb, 102; Stephens vs. Cooper, 1 John Ch., 429; Squire vs. Harder, 1 Paige, 494; Id., 562; Newton vs. Sly, 15 Mich., 391.)

Lackland, Martin & Lackland, for Defendant in Error.

I. Where the seizin of the husband is instantaneous, or he is a mere conduit through which to pass the title to accomplish an ulterior design, the wife is not entitled to dower. (Washb. Real Prop., vol. 1, p. 176; Crabb Real Prop., vol. 1, p. 161; Stanwood vs. Dunning, 14 Me., 290; Woolridge vs. Wilkins, 3 How. Miss., 369; Gully vs. Ray, 18 B. Monroe, 107; McCauley vs. Grimes, 2 Gill and J., 318; Mayberry vs. Bryen, 15 Peters, 39; Webster vs. Campbell, 1 Allen, 314; Pendleton vs. Pomeroy, 4 Allen, 510; Holbrook vs. Finney, 4 Mass., 565; Staw vs. Teft, 15 John., 458; Cunningham vs. Knight, 1 Barb., 399; Moore vs. Rollins, 45 Me., 493; Edmonston vs. Welsh, 27 Ala., 578; Gammon vs. Freeman, 31 Me., 343; Bullard vs. Bowens, 10 N. H., 500; Emmerson vs. Harris, 6 Met., 475; Derush vs. Brown, 8 Ham., 412; Moore vs. Esty, 5 N. H., 469; Small vs. Proctor, 15 Mass.,

495; Eslava vs. Lepetre, 21 Ala., 405; Edmonston vs. Montague, 14 Ala., 370; Smith vs. Addleman, 5 Blackf., 406.)

II. The seizin of the husband is transitory or instantaneous where the same act or transaction which gives him the estate conveys it out of him, or where he takes a conveyance in fee, and at the same time re-conveys in mortgage to secure the purchase money. (Greggs vs. Smith, 7 Halst., 22; Mayberry vs. Brien, 15 Pet., 21; Craft vs. Craft, 2 McCord, 54; Holbrook vs. Finney, 4 Mass., 556; Staw vs. Teft, 15 Johns., 458; Coats vs. Cheever, 1 Cow., 460.)

III. Where both instruments are executed at the same time, between the same parties, relative to the same subject matter, they both constitute the same transaction. It is immaterial that they bear different dates, provided they are delivered at the same time. (1 Washb. Real Prop., p. 179; McGowan vs. Smith, 44 Barb. 232; Reed vs. Morrison, 12 S. & R., 18; Cunningham vs. Knight, 1 Barb., 399; Staw vs. Teft, 15 Johns., 485; Moore vs. Rollins, 45 Me., 493; Adams vs. Hill, 9 Foster, N. H., 202.)

IV. The deed from Louis Provenchere and Catharine his wife to Felix Fontaine, bears date July 10, 1835. The deed from said Felix to Deronin, trustee of said Catharine, is dated July 11, 1835. Both deeds were acknowledged before the same officer July 11, 1835, and filed for record and recorded on the same page of the same book in the recorder's office on the date last aforesaid. In such case, the law presumes that both deeds were executed and delivered July 11, 1835, and constitute one transaction. (Cunningham vs. Knight, 1 Barb., 399; McGowan vs. Smith, 44 Barb., 232, and cases above cited.)

V. The title did not pass from Provenchere to Fontaine; nor from him to Deronin, until the deeds were delivered. The legal presumption is that they were not delivered until they were acknowledged. Both were acknowledged on the same day, before the same officer, and both filed for record on the same day upon which they were acknowledged. The record of a deed is *prima facie* evidence of its delivery. The

only evidence on this point, contained in the record, proves that both deeds were executed, delivered, and filed for record on the same day, and therefore make but one transaction, as they relate to the same property. (2 Washb. Real Prop., vol. 2, side p. 582, top p. 609, 610; Mayer vs. Hill, 13 Mo., 251; Pearce vs. Danforth, 13 Mo., 360.)

VI. We submit that the proper legal construction of the deeds above mentioned is, that Felix Fontaine was never beneficially seized of the premises described in the petition, or any part thereof, so as to entitle his wife to dower; but that the seizin was only instantaneous and transitory; that he was only used as a mere conduit to pass the title out of Louis Provenchere into Deronin in trust for the sole use of the wife of the said Louis, and the heirs of her body.

VII. The deposition of plaintiff and the statement of Babcock were competent evidence. Although it may be true that defendant is estopped from saying that said Felix was not seized of any estate whatever, it is permitted to show the nature or character of the seizin. It may be shown, even by parol proof, that he was only seized of an implied or resulting trust.

It is true the recital of the consideration of $2,000.00 in the deed from said Louis and wife to said Felix, may be conclusive for the purpose of passing the title from the grantors to the grantee; but it is not conclusive for any other purpose. As to the question whether the said Felix did in fact pay said Louis $2,000, or any other sum for the land, this recital is regarded as a mere receipt, which is only *prima facie* evidence and may be rebutted, contradicted or explained by oral testimony. Provenchere might have sued Fontaine, and, notwithstanding the recital in the deed that the money had been paid, he would have been allowed to prove it was still due and unpaid.

This court has repeatedly held, that the grantor in a deed conveying a fee simple absolute, acknowledging the receipt of the consideration, is not estopped from showing a different consideration than that mentioned in the deed; and it is dif-

ficult to see why the same privilege does not extend to the grantee. (Rabsuhl vs. Lack, 35 Mo., 316; Peacock's Administrator vs. Nelson, 50 Mo., 256; Farnum vs. Loomis, 2 Oregon, 29; Fenstonevs. Same, 2 Ohio, N. S., 415; Emerson vs. Harris, 6 Met., 475; Smith vs. Addleman, 5 Blackf., 406; Worsham vs. Callison, 49 Mo., 206.)

WAGNER, Judge, delivered the opinion of the court.

This was a suit for the assignment of dower under the statute. The petition averred that the plaintiff was the wife of Felix Fontaine, who died in 1849, and, that during the coverture the said Felix was seized in fee of the premises described, and that she was entitled to dower therein.

The answer denied that the said Felix was ever seized of such an estate in said premises as to entitle plaintiff, as his wife, to dower.

On the trial in the Circuit Court the defendant admitted that one Louis Provenchere was seized in fee of the premises on the 10th day of July, 1835. Plaintiff then read in evidence a deed executed by Provenchere and Catharine, his wife, dated July 10th, 1835, conveying the premises to Felix Fontaine, for the expressed consideration of $2,000. This deed was acknowledged before Hough, a justice of the peace, on the 11th day of July, 1835, and recorded on the same day.

Plaintiff further read in evidence, a deed executed by Felix Fontaine alone, conveying the premises to one Francois Deronin in trust, for the sole use of Catharine Provenchere, the wife of Louis, and the heirs of her body. The consideration in this deed was stated to be twenty-five dollars, and it was dated and acknowledged before the same officer, and recorded July 11, 1835. Defendant admitted that plaintiff was the wife of Felix Fontaine on the 11th day of July, 1835, and that he died in 1849, and that it claimed title by intermediate conveyances under Louis Provenchere.

Defendant then offered in evidence the deposition of plaintiff and the statement of Babcock, an examiner of titles, to both of which the plaintiff objected, but the court admitted

them and an exception was saved. The case was tried before the court sitting as a jury; and at the close of the testimony plaintiff requested the court to declare the law to be, that on the evidence and admissions in the cause, plaintiff was entitled to dower in the land described in the petition. This was refused, and on the application of the defendant the court gave the converse of the proposition, and instructed that under the evidence in the case, the plaintiff was not entitled to recover. The court gave three other instructions at the instance of the defendant, which were unquestionably subject to criticism, but they were needless and harmless, for by the first instruction the whole case was decided, and as the trial was before the court, they could not have misled its judgment. The question in the case, therefore, is whether the seizure of Fontaine, the plaintiff's husband, in the estate, was of such a beneficial interest as would entitle her to dower, or whether it was merely transitory? Perhaps no principle of the law is more firmly or thoroughly established than that where the seizin of the husband is for a transitory instant only, as where the same act which gives him the estate also conveys it out of him, or where he is the mere conduit employed to pass the title to a third person, no right of dower passes. (1 Scrib. Dow., 259.) To this principle may also be referred the well settled doctrine that where a deed for lands is executed, and simultaneously therewith the purchaser gives back a mortgage upon the same lands to secure any portion of the purchase money, he acquires, as against the holder of the mortgage, no such seizin as will entitle his wife to dower. The deed and mortgage, although in themselves separate and distinct instruments, nevertheless, under the circumstances are regarded as parts of the same contract. They take effect at the same time, and the giving of the deed upon the one part, and of the mortgage upon the other, is held to constitute but a single act, and to result in clothing the purchaser with the seizure for a transitory instant only. (Id. 261 and note 2.)

It is not even essential to the application of this rule that the two instruments should correspond in date, provided they are delivered at the same time, as they take effect from the time of delivery only. And it is competent to show by parol at what time the delivery was actually made. (Mayberry vs. Brien, 15 Pet., 21; Reed vs. Morrison, 12 S. & R., 18; 1 Washb. Real Prop., 178.) But wherever there is a beneficial seizin in the husband, no matter how short the time, it will be sufficient to clothe the wife with the right of dower. In Grant vs. Dodge, (43 Me., 489), the above rules were recognized, but it was said that if the tenant would defeat the demandant's claim of dower, the burden would be upon him to prove that the deed and mortgage relied on constituted one transaction. But in a subsequent case in the same court, (Moore vs. Rollins, 45 Me., 493), it was held that where one has received a deed of an estate and given back a mortgage of the same to secure the purchase money, if the deeds are of the same date, have the same attesting witnesses, and are acknowledged before the same magistrate, and the notes secured are of the same date with the mortgage, in the absence of all proof to the contrary, the deeds will be regarded as one and the same transaction. In the case of McGowan vs. Smith (44 Barb., 233), the following facts appear: The plaintiff was the widow of McGowan, and whilst he was her husband, he was seized of the premises described in the complaint; McGowan purchased the premises of Charles and Thomas Brady, by an article of agreement in writing, dated September 27, 1828, signed by all the parties. The Bradys were then in possession of the premises, under an agreement of purchase from James Wadsworth and others. An arrangement was made between the Bradys and McGowan to have Wadsworth and others convey directly to McGowan, they (Wadsworth and others) receiving whatever was due to them from the Bradys and McGowan, to execute a mortgage on the premises sold to the Bradys for balance of purchase money. This was done. The deed was recorded in the Monroe county clerk's office, January 2, 1829, at 9 A. M. It was

acknowledged by Cathcart and Ure, in Ontario county, on the 29th day of December, 1828, and by James Wadsworth, in Livingstone county, on the 31st day of December, 1828. The mortgage was recorded in the Monroe county clerk's office, January 2, 1829, at ten A. M., and acknowledged on the same day by McGowan, in Monroe county.

This was the only business transaction the Bradys ever had with McGowan. The court held that the giving of the deed and taking of the mortgage were one transaction, and that the two conveyances were to be considered as executed at the same time, within the spirit and intent of the law, and that, consequently, the plaintiff, as the widow of McGowan, was not entitled to dower in the premises. It will be observed that the acknowledgments in the case just cited were taken on different days, and the instruments were filed for record at different times, but there could be no question in fact as to their all relating to the same transaction, and in contemplation of law, McGowan's seizure was merely transitory. In the case of Cunningham vs. Knight (1 Barb., 399), it was held that where, upon the purchase of land, a deed is executed by the vendor, and a mortgage upon the land purchased is executed by the purchaser, and both conveyances are acknowledged and recorded at the same time, the presumption is that they were executed simultaneously. The facts as to dates in this last case are practically the same as in the case at bar. The deed was dated on the 2nd of May, acknowledged on the 3rd, and it was recorded on the 5th. The mortgage was dated on the 3rd of May, acknowledged on the same day and recorded on the 5th. In the case we are now considering, the deed from Provenchere to Fontaine was dated July 10, 1835, and acknowledged and recorded on the succeeding day, the 11th of the same month. The deed by which Fontaine conveyed the land to Deronin, in trust for Mrs. Provenchere, was dated, acknowledged and recorded on the 11th day of July, 1835, the same day on which the acknowledgment and recording of the first deed took place. Both acknowledgments were taken before the same officer, and the natural and necessary presumption is that they were

both delivered and recorded at the same time, and that they constituted one and the same transaction. That the first deed was dated one day prior in point of time will make no difference. A deed is not generally executed till it is acknowledged, and till that takes place there will be no presumption of delivery. Then so far as presumptions are to be relied on, the execution and recording of the two deeds were concurrent acts, which the law will construe to be one transaction.

Whilst it is true that parol evidence will not be admissible to vary the effect of the deed, we do not understand that the deposition of the plaintiff was offered for that purpose. It was simply to show the circumstances and condition of the parties at the time it was executed, and rebut the idea that the consideration expressed in it was ever paid, and for these objects it was properly admitted. The consideration clause in a deed has only the force and character of a receipt, and is always open to explanation and contradiction. The plaintiff states in her deposition that no relationship whatever existed between her husband and Provenchere, and it is unaccountable that he should have paid $2,000 for the property and immediately deeded it back for Mrs. Provenchere's benefit for the mere nominal consideration of $25. Moreover, from her own statements, she shows that her husband was a poor man, supporting his family by his daily labor, and that she never knew of his having any money sufficient to purchase the property, and that she knew of no other transaction that ever took place or was had between the parties.

Babcock's statement shows that there is no record in St. Louis that Fontaine was ever interested in any other piece of real estate. The conclusion from these facts follows irresistibly that Fontaine, in the transaction, was a mere conduit employed by Provenchere to pass the title in a third person for the use of his wife, and that his seizure was transitory and not beneficial, and, therefore, the plaintiff, as his widow, is not entitled to dower in the premises. The result is that the judgment must be affirmed; all the judges concur.

STATE OF MISSOURI, to use of L. M. CONKLIN, Respondent, *vs.* LEWIS S. BARADA, *et al.*, Appellants.

1. *Garnishment—Wages—Appraisement.*—Debts and wages garnished by a constable and claimed by the debtor in execution to be exempted, are not required to be appraised in the manner provided for property levied upon.
2. *Execution—Exemption—Who must protect debtor.*—The exemption rights of a debtor in execution must be protected by the constable, whether they apply to property seized or to debts garnished.
3. *Justice's Court—Jurisdiction over plaintiff and garnishee.*—A justice of the peace has no jurisdiction in a trial upon interrogatories and answers between the plaintiff in execution and a garnishee, to determine the rights of the defendant upon his claim to select and hold the garnished debt as exempt from execution.
4. *Execution—Garnishment—Claim by debtor—Return.*—The officer holding an execution is bound by law to apprise the debtor of his rights, and the powers conferred upon him are ample to protect them in every possible case. If there be a garnishment upon which the debtor makes his selection and claim, the officer must show the facts in his return upon the execution, with the debt or amount reserved and set over to the defendant.
5. *Judgment affirmed.*—Judgment affirmed because manifestly for the right party, although error appears in the record.

Appeal from Audrain Circuit Court.

G. B. Macfarlane, for Appellants.

I. The term property as used in §§ 11 and 12, of the chapter on executions does not include debts and wages, and the constable was not required to have Ladd's debt to Conklin appraised, as in appraisement of working animals. (§§ 11 and 12, p. 604; Gregory vs. Evans, 19 Mo., 261.) Debts and wages are not subject to execution except by process of garnishment. (§ 16, p. 605; § 2, p. 606, Wagn. Stat.) Mahan vs. Scruggs, 29 Mo., 282, is not in point.

S. A. Craddock & M. S. Hollister, for Respondent.

I. Conklin claimed, as the head of a family, the Ladd debt, in lieu of the property mentioned in the 1st and 2nd sub-divisions of sec. 9 of the chapter on executions, and when he notified the constable that he selected and held it as exempt from execution and garnishment, it was the duty of the constable to set it off to him, and the constable's refusal to do

so was wrongful and contrary to the statute. (Wagn. Stat., p. 603–4, §§ 9, 11, 12; Mahan vs. Scruggs, 29 Mo., 282; State vs. Romer, 44 Mo., 99; Garret vs. Farmer, 21 Mo., 160.) The 11th and 12th sections of the chapter on executions most clearly include debts and wages. No other construction can be possibly placed upon them. Any other construction would be contrary to the plain declaration of the statute and contrary to the opinions of this court. (Mahan vs. Scruggs, 29 Mo., 282.)

Lewis, Judge, delivered the opinion of the court.

This was a suit upon a constable's bond. William L. Grim obtained judgment before a justice of the peace, against respondent's usee, Conklin, for $140. The appellant Barada, as constable, upon execution coming to his hands, garnished Amos Ladd, who was indebted to Conklin on a promissory note for $100. It is charged that the officer failed to apprise Conklin of his rights, as required by the statute; that Conklin, nevertheless, repeatedly notified Barada, before the return of the garnishment, that, as head of a family and owning no other property, he claimed to hold the Ladd note exempt from execution. That the constable disregarded his claim and merely referred him to the justice.

The garnishee failed to answer, and judgment was rendered against him in favor of the execution plaintiff for the amount of the note and interest, whereby the same was lost to Conklin.

The answer after denying generally the derelictions alleged, set up several special defenses, some of which were stricken out on respondent's motion. The case was tried before a jury who found for the plaintiff in the amount of the garnished debt and interest.

No doubt appears to have been entertained at any stage of the proceedings, that the debtor was entitled under section 11, on page 604 of Wagner's Statutes, to hold exempt from execution the debt due from Ladd. The controversy turns upon the inquiry, what is the method by which, in a case like

this, the execution debtor must make his statutory right available? By the respondent it is held to be sufficient that he make his claim to the officer, whose duty it then becomes to take such steps under the 12th and 13th sections, as will secure to the debtor his demand against the garnishee, within the proper limit of value. The appellants insist that no such duty belongs to the officer; that he is required by law to serve and return the garnishment process at all events; and that the debtor must proceed before the justice, by interplea or otherwise, to establish his right.

While the statute is sufficiently clear upon the course to be followed when articles of personal property are in question, it gives no specific direction for the case of a debt garnished and claimed by the defendant. Nor have we any better guide in former adjudications of this court. In Gregory vs. Evans, (19 Mo., 261,) the execution debtor reserved his claim of exemption for a garnished debt to be passed upon by the justice in the trial of the garnishment. The justice sustained him, giving judgment against the plaintiff in execution, although the garnishee acknowledged indebtedness to the defendant. On appeal the Circuit Court did the same thing. The Supreme Court reversed the judgment on other grounds, making no allusion to the regularity of the initial proceeding. In Mahan vs. Scruggs, (29 Mo., 282,) the constable responded to the defendant's demand by allowing him the debt garnished. The plaintiff in execution thereupon sued the constable for breach of duty, and the case turned upon the question whether the defendant was entitled to the exemption in any shape. Again no reference was made to the propriety of the course adopted by the debtor; and thus either of the antagonistic methods here suggested would appear to have had a judicial toleration. The exigencies of the present inquiry demand an interpretation of the statute which shall discover the true rule for its practical enforcement.

The court below instructed the jury that, "it was the imperative duty of the defendant, made so by the law of executions, to have had the plaintiff's property appraised by three

disinterested householders of the neighborhood, to ascertain if the plaintiff, Conklin, was entitled to have this Ladd note set off to him; and if the jury find from the evidence, that defendant Barada, as constable, failed or neglected to have plaintiff's property so appraised, then the jury will find for the plaintiff."

This instruction was not authorized by the language of the statute. Certain specific exemptions having been provided for, the 11th section permits the head of a family, in lieu of them, to "select and hold exempt from execution any other property, real, personal or mixed, or debts and wages, not exceeding in value the amount of three hundred dollars." Here are two classes of objects, one of them being "property," of three several kinds, and the other "debts and wages." The next section provides for the appraisement and sale of "such property," saying nothing about the other class. Debts and wages are, therefore, not contemplated in the provision for appraisement. The property to be appraised is manifestly that selected under the 11th section. And, as it is not pretended that anything was selected, except the Ladd debt, there was no proper application for the instruction.

In further passing upon the instructions, given or refused, the court sustained the plaintiff's theory to the effect that the protection of the execution debtor's rights in the premises, was incumbent on the constable, and could not be remitted to any course of procedure before the justice of the peace. In this we think the court properly declared the law.

It is argued for the appellants that in section 39, on page 670, Wagn. Stat., the law points out the true refuge for the execution debtor, and relieves the officer of all responsibility in his behalf. This provides that, "any person claiming property, money, effects or credits attached, may file his interplea in writing, in the cause, etc." But this court has repeatedly construed the same statutory language, and uniformly held it inapplicable for any purpose, to garnishment proceedings. (Wimer vs. Pritchartt, 16 Mo., 252; Gordon vs. McCurdy, 26 Mo., 304.)

It is also urged that the constable cannot know the value of the debt garnished; that such knowledge is essential to an adjustment of the debtor's rights, with reference to other property claimed; and that appraisement being inappropriate, it becomes necessary for the debtor to wait until a judgment on the garnishment shall fix the value of the debt due from the garnishee, before it can be set over to him. This might do, if we had a law by which the justice could transform a judgment docketed in favor of the execution plaintiff, into one in favor of the execution defendant. The defendant's statement of its amount, or any less interest which he claims, will suffice as to him. The plaintiff cannot be prejudiced; because if the amount prove greater than the defendant's right covers, he will get the excess. If less than the defendant claims, he will still be the gainer.

The proposition that the debtor's exemption right may be adjusted in the trial of the garnishment, is seriously interfered with by section 27 of the chapter on garnishments, at page 668 of Wagner's Statutes. It says: "The following interrogatories and ***none other***, shall be propounded to a garnishee summoned in a suit before a justice of the peace, etc." The first relates only to property in possession. The second and last is: "At the time of the service of the garnishment, did you owe the defendant any money, or do you owe him any now? If so, how much, on what account, and when did it become due?" If not yet due, when will it become due? These interrogatories cover the entire field of the justice's jurisdiction in the premises. They can properly elicit no response touching anything but the simple fact of indebtedness, or the contrary, from the garnishee to the defendant. Clearly then, the justice can neither inquire into nor adjudicate upon the peculiar rights of the defendant, as against the execution plaintiff, in that proceeding. But, independently of this, there appears no obligation on the garnishee to shape his defense in the interest of the execution debtor. It matters nothing to him whether plaintiff or defendant is to profit by a judgment against him. He has only to take care of himself.

The practical solution of these difficulties places the responsibility where the legislature evidently intended to leave it—with the officer holding the execution. He must apprise the defendant of his rights. He must yield to the defendant's selection and release to him the property selected, up to a prescribed limit of value. He is invested with authority to ascertain the value by appraisement, and so give full efficacy to the law's bounty. He must pay over to the defendant his share out of the proceeds of a sale. In short, the whole subject matter of the debtor's protection seems committed to that officer, and none other is designated for any step in the process. It would be an incredible omission from such a plenary investiture of powers and duties for carrying out the general design of the law, which should leave him helpless in one of its most essential elements. We hold that the duty of the constable in the present case was to allow, to the extent of his authority, the exemption to which the debtor was entitled. This he could have done in either of several ways. If satisfied that the claim against the garnishee was for an amount within the debtor's right, he could make return of the facts upon the execution, without any service on the garnishee. If the claim appeared to be in excess of the right, he could make a like return of the facts, with a declaration that he reserved and set over to the defendant so much of the garnishee's indebtedness as the exemption right covered. Such a return, in either case, would at least clear his responsibility.

Upon the whole record, the judgment below was manifestly for the right party, and is affirmed. The other judges concur.

STEPHEN BIRD, *et al.*, Executors of JOHN BIRD, Plaintiffs in Error, *vs.* THOMAS COTTON and HARDIN M. WARD, Defendants in Error.

1. *Practice, civil—Pleading—Plaintiff's character as executor, sufficiency of allegations of.*—When in a petition plaintiffs styled themselves the executors of A., stated that the note sued on was made to their testator, averred his death, and brought into court and made profert of the letters of administration: *held*, that although there was no direct averment of plaintiffs' appointment as executors, yet that fact was necessarily inferrable from the other facts stated, and the petition was not so defective as to be demurrable on that account.

Error to Pemiscot Circuit Court.

George E. Hatcher and Louis Houck, for Plaintiffs in Error.

Ward & Watkins, for Defendants in Error.

WAGNER, Judge, delivered the opinion of the court.

The plaintiffs, styling themselves in the caption of the petition executors of the estate of John Bird deceased, commenced their action against the defendants upon a note which it was alleged was made by the defendants and payable to the testator. In the petition the date of the note was not given. There was an averment that a certain payment was made on the note, but at what time was not stated.

It was also stated that Bird, the testator, afterwards died, and that the plaintiffs brought into court their letters testamentary, and made profert of them.

To the petition the defendant demurred, and assigned as objections: 1st. That there was no sufficient description of the note sued on. 2d. That it was not alleged that letters testamentary were granted to plaintiffs by a court of competent jurisdiction, and, 3d. That it was not averred when the payment on the note was made.

Before the demurrer was acted on the plaintiffs obtained leave and amended their petition, stating that the note was executed and delivered on a certain day and year therein specified. But notwithstanding this amendment the court sustained the demurrer. If there was ever any force in the

first ground of objection taken it was clearly cured by the amendment.

The capacity in which the plaintiffs sued was not as clearly stated as it should have been, to comply with the rules of good pleading. But the petition styled the plaintiffs as executors, stated that the note was made payable to their testator, averred his death, and then brought their letters into court and offered to make profert of them. All these facts taken together, showed unmistakably the capacity in which plaintiff sued, and their right to sue, and would enable any person to know what was intended. And although the petition is not to be commended, and certainly cannot be construed into a model of good pleading, yet it is not so glaringly defective as to justify the action of the court. There was no direct averment of plaintiffs' appointment as executors, or that they were executors, but these facts were necessarily inferrable from the other facts stated.

As to the objection, that it was not stated when the payment was made on the note, that was immaterial. It was a matter properly arising upon, or to be taken advantage of by the evidence.

The judgment should be reversed and the cause remanded. All the judges concur.

COLUMBUS C. RUMFELT, Plaintiff in Error, *vs.* LAWRENCE O'BRIEN, Defendant in Error.

1. *Ejectment—Sheriff's Deed—Land and land titles.*—In ejectment the defendant's introduction of a sheriff's deed of the plaintiff's title, is an admission that the plaintiff owned the property at the date of the execution sale.
2. *Judgment—Recitals in—Evidence—Notice.*—A recital in a judgment that the defendant has been "duly served with process," is conclusive against him on the question of notice. The judgment cannot be impeached by the introduction of other parts of the record which fail to show when or how the process was served.

Error to Scott Circuit Court.

Lewis Brown and S. M. Green, for Plaintiff in Error: cited, M'Clay vs. Freeman, 48 Mo., 234; Howard vs. Thornton, 50 Mo., 291; Lenox vs. Clark, 52 Mo., 117; Fithian vs. Monks, 43 Mo., 502; Durosett vs. Hale, 38 Mo., 346; Janney vs. Spedden, *Id.*, 395; Harris vs. Grodner, 42 *Id.*, 159.

Louis Houck, for Defendant in Error.

I. The judgment cannot be collaterally assailed. (Freeman vs. Thompson, 53 Mo., 190.)

II. A judgment and its recitals must be treated as correct until reversed. (Bernecker vs. Miller, 44 Mo., 102.)

III. The record of a judgment in partition which recites that all the parties named had been duly notified of the suit, is conclusive. (Latrielle vs. Dorleque, 35 Mo., 233.)

And where the record shows a finding of the court, the fact cannot be collaterally attacked. (Kane vs. McCown, 55 Mo., 20; Cooper vs. Reynolds, 10 Wall., 321; Freeman Judg., § 130, *et seq.*)

IV. The purchaser at sheriff's sale looks to the judgment, levy and sheriff's deed. All other questions are between the parties to the judgment and the sheriff. (Lenox vs. Clark, 52 Mo., 115.)

Lewis, Judge, delivered the opinion of the court.

Petition in ejectment was filed August 14, 1872, for a lot in the town of Benton. The answer was a general denial in the usual form.

Trial was had before the court sitting as a jury. The plaintiff introduced a deed of the premises to himself and John A. Hinton, from James Parrott and wife, dated July 2, 1860, and proved the grantee's possession in 1861. For the purpose, it is presumed, of fixing in advance the character of defendant's claim, he introduced detached parts of the record of a suit instituted August 10th, 1863, in the Scott Circuit Court, in which the Union Bank of Missouri was plaintiff

and Hinton and Rumfelt, with others, were defendants. These included, in the following order, the judgment, petition, summons and return, several orders of publication with their proofs, and copies of the bill of exchange and protest upon which the suit was founded. Here the plaintiff rested, having exhibited nothing, so far as can be discovered, to connect the defendant's possession with these proceedings. The defendant then introduced a sheriff's deed to William C. Hayden, under the Union Bank judgment, conveying the lot in controversy as the property of Hinton and Rumfelt, and bearing date April 12, 1867. It was admitted that defendant claimed title and possession by conveyance from the sheriff's grantee. The court's finding and judgment were for the defendant.

Whatever doubts might have arisen at the close of the plaintiff's testimony as to the sufficiency of his *prima facie* case, the defendant furnished a solution of them in his introduction of the sheriff's deed. He thus admitted that the plaintiff had the title of the property at the date of the execution sale. (Brown vs. Brown, 45 Mo., 412.) From that moment the controversy was to be determined by the competency of the sheriff's deed to divest the plaintiff's title.

The plaintiff insists that the judgment under which the sheriff sold was void as to Rumfelt, for want of notice. The return on the summons introduced by plaintiff exhibited personal service on the defendants, Hinton and Levi S. Green, adding, "the other said defendants not found in my county." The petition stated that Rumfelt and two other defendants, Allen and Parrott, were non-residents, and this was sworn to by plaintiff's attorney. Orders of publication, each of which is claimed to have been tainted with irregularity, were made and the publications proved against these three. The judgment rendered April 8th, 1865, recited as follows: "The plaintiff, by her attorney, comes and dismisses this suit as to defendant, Thomas J. Allen, and the court being satisfied that the order of publication made at the last term of this court, notifying defendant, James Parrott, of the pendency of

this suit, has been made agreeably to law, and the other defendants being *duly served with process* and having been solemnly called, etc."

We do not perceive how it can be said, consistently with the great array of authorities bearing upon this subject, that the judgment was void as to Rumfelt. It will be observed that nothing is here to show that the several fragments exhibited in evidence constituted the whole record of the Union Bank case. For aught that appears, there may have been one or a dozen alias writs or counterparts sent to other counties, and by their means service obtained upon Rumfelt. The judgment solemnly declares that he was "duly served with process," and this record imports absolute verity. It is contradicted by nothing in the orders of publication or in the return upon the writ introduced, for these are simply silent on the subject, when we consider how many other methods there were for accomplishing the fact stated. It will be time enough to assume that the judgment is negatively falsified by the rest of the record, when it shall be made to appear that the entire record is before us.

In Freeman vs. Thompson, (53 Mo., 183) this subject is so exhaustively discussed, that no additional light can be thrown upon it here. In Baker vs. Stonebraker, (34 Mo., 172) and in Warren vs. Lusk, (16 *Id.*, 102) it was decided by this court that a recital in a judgment that the defendant appeared by attorney, was conclusive, and the defendant could not, in a collateral proceeding, deny the fact of authority given by him to the attorney. If a record implication of the relation existing between the defendant and an attorney be thus unimpeachable, how much more so should be the declaration of a service performed by the court's ministerial officer, direct information whereof is provided for in the sheriff's return—a part of the record itself.

In the giving and refusing of instructions, and in the determination of the cause, the court below was governed by the principles here recognized. Its judgment is affirmed with the concurrence of the other judges.

JOSEPH G. CLARKSON, Defendant in Error, *vs.* L. L. STANCHFIELD, *et al.*, Plaintiffs in Error.

1. *Practice, Supreme Court—Absence of bill of exceptions.*—No bill of exceptions appearing in the record, the Supreme Court cannot review the action of the court below, upon motion and affidavits to set aside the judgment.
2. *Ejectment—Title—Judgment—Possession.*— The purpose of the action of ejectment is to try title, and it is not error for the judgment to declare ownership in the plaintiff, when the petition demands only possession of the premises.
3. *Ejectment—Possession—Disclaimer—Judgment.*— A "disclaimer" of possession by defendant in ejectment, is nothing more than a denial of one of the facts necessary to sustain the plaintiff's action. The finding for the plaintiff on the issues is conclusive against the defendant as to possession, and entitles the plaintiff to judgment.

Error to Wayne Circuit Court.

Kitchen, Pope & McGinnis, for Plaintiffs in Error.

I. The issue of ownership was not before the court and it should not have passed upon it in its judgment.

II. Plaintiff in his reply to the separate answer of Hull & French, does not traverse their disclaimer of title to, and possession of all except a part of "east one-half of south one-quarter." The issue then was upon defendant's possession of this part of "east one-half of south one-quarter," if that issue was found against defendants, judgment should have been given for possession of that part alone and for the damages to that. The judgment in ejectment can go no further than to take from defendants the possession of the real estate in his possession, when suit was brought, and damages. Judgment is for possession of the 240 acres; more than was embraced in the issue before the court.

III. "If error is apparent onthe face of those pleadings, which constitute the record proper, we will reverse the cause whether any exception was taken or not;" (38 Mo., 489,) and "if the judgment be erroneous it will be reversed though no motion be made to set it aside in an inferior court." (Whit. Prac., 516, and authorities cited.)

Whittelsey and B. Zwart, for Defendant in Error.

I. The defendants not having made the action of the court upon the motion to set aside the judgment, filed at a term subsequent to the judgment, part of the record by bill of exceptions, this court cannot consider such motion. (Hoyt vs. Williams, 41 Mo., 270; Gramp vs. Dunnivant, 23 Mo., 254; Bateson vs. Clark, 37 Mo., 31; Richardson vs. George, 34 Mo., 104 and note; State vs. Bacheler, 15 Mo., 208; Mechanics' Bank vs. Klein, 33 Mo., 559; Hart vs. Walker, 31 Mo., 26; Whit. Prac., §§ 384, 5, 6; *Id.*, p. 489.)

II. There being no error of record apparent, there is no irregularity shown for which the judgment should be set aside or reversed. Plaintiff therefore asks an affirmance of the judgment of the Circuit Court.

Lewis, Judge, delivered the opinion of the court.

This was an action of ejectment against four defendants. When the cause was reached for trial, the plaintiff dismissed as to one defendant. The other three having answered, but not further appearing, the cause was submitted to the court without a jury, whereupon the finding and judgment were for the plaintiff, for recovery of possession and $1,650 damages, with $10 for monthly value until surrender of the premises. No motion for a new trial was filed, nor does any bill of exceptions appear in the record.

The transcript before us presents a motion filed by defendants at the next succeeding term, to set aside the judgment, together with sundry affidavits in its support. The motion would appear to have been overruled. But none of these matters were preserved in a bill of exceptions. By a rule well established and generally known, we are therefore precluded from bestowing any attention upon them. (Brown vs. Foote, 55 Mo., 178.)

The counsel for plaintiffs in error, urge that there are sufficient grounds for reversal appearing in the record proper. One is, that, while the petition demands only possession of the premises, the judgment declares that the plaintiff is

"owner of" and entitled to possession of them—thus giving him more than he has asked for. There is nothing in this objection. The whole spirit and purpose of the action of ejectment is to try title and, by the very terms of the statute, the plaintiff could only recover against a defendant "not having a better title" than his own. The reference to ownership in the judgment, introduces no new element of recovery and, if objectionable at all, it can only be as surplusage.

It is also insisted that the defendants in their answers, "disclaimed" possession or title as to a large part of the land sued for, and therefore the judgment is erroneous in not excepting so much out of the recovery. This is equivalent to saying that the plaintiff could not recover upon his petition and proofs, but only on the defendant's answer without proofs. Possession by the defendant is one of the facts which a plaintiff in ejectment must allege and prove. The defendants in this case denied that fact as to all the land except 20 acres. The finding of the court, on the pleadings and "the evidence introduced," was against them on that issue, and there was the end of it.

We find no error in the record proper, and as no other matter is properly before us, the judgment must be affirmed. The other judges concur.

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HENRY M. DURKEE, Appellant, *vs.* AARON K. CHAMBERS, Respondent.

1. *Assignments, fraudulent—Knowledge as to fraud by assignee.*—A *bona fide* assignee for value will not be affected by the fraudulent intent of his assignor, of which he has no knowledge. Knowledge of the mere fact of the assignor's indebtedness at the time of the transfer will not be sufficient to defeat it.
2. *Practice, civil—Witnesses, credibility of—Jury.*—The credibility of witnesses must be passed upon by the jury.
3. *Equity—Special verdict—Chancellor not bound by.*—The chancellor is not bound by the verdict of a jury on special issues submitted to them.
4. *Equity—Decree—Reversal of action by Supreme Court—What proper.*—Where the order or decree of a chancellor is reversed on appeal, the Supreme Court ought to render such decree as may be right upon a review of the whole record.

Appeal from Scotland Circuit Court.

E. G. Pratt, J. C. Anderson & H. M. Durkee, for Appellant.

Birch & Mackey, for Respondent.

NAPTON, Judge, delivered the opinion of the court.

This proceeding was commenced in the Circuit Court of Scotland county in 1872, to subject certain lands in that county, to which defendant had the legal title, to the payment of certain claims belonging to the plaintiff.

It seems that one Allen, the father-in-law of the defendant, Chambers, lived in Callaway county, and had a note upon one Woods, for $3,250.00, dated in 1857 and secured by a mortgage on a tract of land in Scotland county. Suit was instituted on this note and mortgage in 1852, in Scotland county, and was pending in 1862, when Allen went up to Scotland county and sold the note and mortgage to his son-in-law, the defendant, who then had been living in this county for several years, though previously a citizen of Fulton in Callaway county, and residing during the years 1857, '8, '9, partly at the house of Allen.

Allen's property in Callaway county was not sufficient to pay his debts, in 1862. The suit against Woods by Allen, was, immediately after the transfer to Chambers, continued in Chamber's name, and was not finally determined until 1870. A credit of $2,000 on the note, besides some small credits indorsed on it, was claimed, and the title to a portion of the tract of land was disputed, and claimed by the heirs of Cadwell. This suit was carried on by defendant, at considerable expense, and loss of time and personal attention on his part, and was ultimately compromised or settled by the defendant's buying up the Cadwell title, and procuring a deed from the mortgagor Woods, to the entire tract.

The creditors in Callaway then assigned to the present plaintiff their claims against Allen, and upon these judgments had executions issued, and the land levied on

and sold as Allen's land; and this suit is brought to set aside Chambers' title, on the ground that the purchase by him was a fraudulent contrivance on the part of Allen and Chambers to hinder, delay and defraud these creditors.

From the bill of exceptions it appears that certain issues involved by the petition and answer, were agreed on and submitted to a jury. These issues were:

1st. That on the 1st day of May, 1862, and prior and subsequent thereto, said Thomas D. Allen was largely indebted to Robert H. Damon and others, of which said indebtedness defendant, Chambers, had full notice. Plaintiff affirms, and defendant denies.

2d. That for the purpose of hindering and delaying his said creditors, the said Thomas D. Allen assigned to the said Aaron K. Chambers a certain promissory note for the sum of $3,250 dated, etc., secured by a mortgage, etc.

3rd. That the said defendant, A. K. Chambers, conspiring with said Allen to hinder, delay and defraud, and for the purpose of enabling the said Allen to hinder, delay and defraud his said creditors, took and received the said assignment and note to himself, and claimed to be the sole and exclusive owner thereof, when in truth and in fact the said Thomas D. Allen was the owner thereof.

These issues, it will be perceived, did not involve any question in regard to the assignment having been made for a valuable consideration, though the petition so claimed, and asserted the assignment to have been purely voluntary and without any consideration whatever, and the instructions of plaintiff are also based on the assumption that the assignment was not voluntary, and the evidence undoubtedly showed a valuable consideration, concerning the adequacy of which however there was a dispute and a conflict of testimony.

The instructions given for the plaintiff and defendant are only important as showing the theory of law on which the court submitted the issues to a jury.

The instructions given for the plaintiff were:

1st. "If the jury believe from the evidence that on the 7th day of May, 1862, and prior and subsequent thereto, one Thomas D. Allen was indebted to Damon, etc.; and that defendant had notice of the indebtedness, the jury will find the first issue for the plaintiff." 2nd. "If the jury believe from the evidence, that, for the purpose of delaying and hindering his creditors, the said Thomas D. Allen assigned to the said Chambers a certain promissory note, etc., they will find the second issue for plaintiff." 3rd. "If the jury shall believe from the evidence, that Chambers took the assignment from Allen for the purpose of enabling Allen to delay his creditors, they will find the third issue for plaintiff." The 4th is a mere statement of what the pleadings admit. 5th. "If the jury believe that defendant Chambers conspired with Thomas D. Allen to hinder and delay his creditors, or to enable the said Allen to hinder or delay his creditors, and received to himself the note and mortgage assigned, and claimed to be the owner thereof, they will find the third issue for plaintiff. 6th. "If the jury believe that Chambers paid a full consideration for the assignment from Allen, yet if the jury further believe that Chambers intended thereby to enable the said Allen to hinder, delay or defraud his creditors, they will find the third issue for plaintiff."

Four instructions were given for defendant:

1st. "If the jury find that the defendant Chambers, did purchase in good faith the said promissory note and mortgage of the said Thomas D. Allen, and also the interest of the said Thomas D. Allen in the suit then pending in Scotland Circuit Court thereon, for a valuable consideration paid or agreed to be paid, they will find for defendant on the second issue submitted, unless they further find that the same was done by the said Allen to hinder, delay and defraud his creditors; and that defendant Chambers had notice thereof." 2nd. "Though the jury find from the evidence, that the consideration for which the assignment of the note and mortgage was made, was less than the actual value of the land on which said mortgage was given, yet said assignment was valid in law and does not

authorize the jury on that account to find for the defendant, unless they further find from the evidence, that the said Allen conspired with the said Chambers, to hinder, delay or defraud said Allen's creditors, and did so enter into said contract and assignment for that purpose, they will find for defendant on the third issue." 3rd. "Although the jury find that Allen, now deceased, did, for the purpose of hindering or delaying his creditors, assign to the defendant a promissory note, etc., unless they also find that said defendant had notice of Allen's indebtedness, they will find for defendant on the second issue." 4th. "If the jury find that the said Allen was largely indebted to Damon, etc., in Callaway county, yet unless they further find that these debts were subsisting at the time of the transfer, and that defendant Chambers had notice, etc., they will find for defendant."

These instructions taken singly are very defective. For instance, the second instruction given for plaintiff is manifestly not the law, if designed to convey the doctrine that a *bona fide* assignee for value would be affected by the fraudulent intent of his assignor, of which he had no knowledge. But it is apparent from the other instructions on both sides, that such was not the design of the instructions.

The real question for the jury to determine was, whether this purchase was *bona fide* and for a valuable consideration, or was made on the part of Chambers to aid Allen in covering up the property from his creditors. And the third instruction given for defendant was erroneous, as it seems to maintain that defendant's knowledge of Allen's indebtedness, although the purchase was in good faith and for full value, would defeat the assignment. But, taking the instructions together, they present the law fairly to the jury on the issues, certainly favorably to the plaintiff.

In regard to the evidence in this case, it is unnecessary to notice its details. It was contradictory in regard to important facts, and in the main presented a mere question of credibility of witnesses, of which the court and jury that tried the case were the most competent judges.

The testimony of Allen, in the form of a deposition taken before the trial, was read without objection, and, if believed, clearly proved a case of concerted fraud. But the jury evidently disregarded his evidence, because in the trial of the case of Chambers vs. Woods, (in the Scotland county Circuit Court) he had testified to just the reverse and had sworn that he had no interest whatever in the land or the suit, and never had any intention of defrauding his creditors.

But a most important and striking fact in this case, and one which doubtless largely influenced the jury and the court, is that the purchase of defendant was really and substantially a purchase of a lawsuit which had been progressing for three years at the date of his purchase, and continued eight years longer, before its final determination.

The suit of Allen vs. Woods, was instituted in 1859. The purchase was made in 1862, and the suit finally ended by compromise in 1870.

It does not clearly appear what difficulties occasioned this delay, as the record of this case of Allen vs. Woods, and subsequently Chambers vs. Woods, is not in evidence. But it seems that one of the defenses was a payment of $2,000, over and above the credits on the face of the note, and that there was a defect in the title to one 80 acres tract of the land, which it ultimately cost the defendant $600 to remedy.

Had the defense succeeded in establishing these two claims, it is obvious that the defendant would have a bad bargain in his purchase from Allen, since it is clear that he gave Allen $250, and paid out in lawyers fees considerable sums, amounting to $500 or $600, and devoted a large portion of his time and labor for eight years to a prosecution of the suit. It is therefore hard to say that the consideration given in 1862, for this assignment, was inadequate.

To compare the actual value of the land in 1862, with the amount advanced in that year, would not constitute a fair criterion to determine the question of adequacy or inadequacy of price.

There is another prominent fact in this case which must have had its influence. The plaintiff in this case represents creditors whose claims are said to have accrued long anterior to 1862. Yet notwithstanding this assignment in 1862, and the continued prosecution of the suit against Woods, from that date until 1870, no attempt was made by the creditors of Allen to question this assignment, yet it is evident from the offer in the case to prove Allen's admissions of insolvency, prior to 1862, that the creditors knew all the facts then, that they did on the institution of this suit.

This delay ought to have been accounted for, but was not, and it was not until eight years after his purchase that this attempt was made to establish it as fraudulent.

A point was made on the trial in relation to the admissions of Allen prior to his assignment. These admissions were excluded. There is no doubt that such admissions, so far as Allen is concerned, would have been good evidence against him, but Allen was not a party to the case, the suit having been dismissed as to him before the trial, and unless they had been made in the presence of the defendant, thereby going to establish his complicity in the fraud, they could not be of any value. Besides, Allen's deposition was read rendering such admissions totally irrelevant and useless, as Allen in his deposition confesses the fraud. Whether, therefore, this evidence had been admitted or rejected, its admission or rejection could have no influence on the result.

The Circuit Court, in trying cases of this character is not bound by the verdict of the jury; but if the verdict is to be disregarded, it would seem a useless expense to submit the issues to the jury. This court undoubtedly may upon the whole record, render such decree as may be thought right, and where a judgment of this kind is reversed, such course ought to be taken.

In this case we are unable to see that any serious error was committed on the trial, or that any different conclusion could be reached on the evidence reported.

We shall therefore affirm the judgment. The other judges concur.

HANNIBAL BRIDGE CO., Appellant, *vs.* BERTHA H. SCHAUBACHER, *et al.*, Respondents.

1. *Public highway—Title to land.*—The owner of land joining on a public highway, street or alley, owns the fee to the center thereof, subject to an easement in the public.
2. *Damages—Condemnation of land.*—Where a statute authorizing the condemnation of land requires the commissioners to "assess the damages which the owner of the land may sustain by reason of such appropriation," the assessment is not confined to the land actually taken. There may be consequential damages which result by reason of the appropriation, which are fairly comprehended within the scope of the law.
3. *Condemnation of land—Damages — Consequential — Measure of.* — When nothing but compensatory damages are allowed, the recovery must be confined to the actual damages sustained; and where the damages consisted in depriving the owner of the use of other lands on which were erections and improvements necessary for the use of the lands remaining, which erections and improvements could be moved to said remaining land, and be then as valuable and useful as before, the measure of damages would be the expense of such removal, and the value of the time lost while it was being effected.

Appeal from Hannibal Court of Common Pleas.

Thomas H. Bacon and W. C. Foreman, for Appellant.

I. The court erred in refusing appellant's instruction, (2) that if the Schaubachers claimed their parcels of land in suit under respective title deeds along the "east line," (Jackson vs. Hathaway, 15 John., 447) and by the "west side," (Smith vs. Slocomb, 9 Gray, 36) of Craig's alley, (Angell Highways, 2 Ed., p. 387, § 314; 3 Kent Comm., 11 Ed., p. 551,; 3 Washb. R. P., 3 Ed., 361, note; Tyler Bound., 1874, ch. XI, pp. 133–144), then such ownership, giving no interest whatever in Craig's alley, did not entitle the Schaubachers to a claim for damage to out-lot 93, arising from the bridge company's appropriation of land exclusively on the other side of Craig's alley. (Hatch vs. Vermont, &c., 25 Vt. 60.)

Being on the opposite side of a thoroughfare street in a city, (Dillon Mun. Corp., 1 Ed., p. 534, § 556), the severance was completed, and out-lot 93 was merely "injuriously affected," (see English Statutes), and our statute makes no provision for such damages in this proceeding, (Wagn. Stat., 1872, p. 326, § 1) nor even for running on the highway itself. (Porter vs. North Mo., 33 Mo., 128.)

II. The court erred in excluding testimony, showing that the brewery premises on out-lot 93 could, at a moderate expense, have been easily placed in thoroughly effective condition by a transfer of the works from the east side of Craig's alley to the respondent's premises on the west. Even in a case of trespass *vi et armis*, the cost of such repair would be the very measure of damage. (Shear. & Redf. Negl., 2 Ed., p. 677–679, § 602; Douglas vs. Stephens, 18 Mo., p. 362–366 Atchison vs. Dr. Franklin, 14 Mo., 63; Brown vs. Worcester, 13 Gray, 31.)

III. It is a general principle that a party cannot recover for damages which could be averted by reasonable exertions. (Fisher vs. Goebel, 40 Mo., 475–481; Waters vs. Brown, 44 Mo., 302, 303; State vs. Powell, 44 Mo., 436, 440.)

James Carr, for Respondents.

I. The statute under which this proceeding took place, is very broad and comprehensive in its terms, viz: "To assess the damages which such owners may severally sustain in consequence of the establishment, erection and maintenance of such road." (§ 1, Art. V, ch. 37, pp. 326–7, Wagn. Stat.) This is broad enough to embrace all consequential damages, as in Massachusetts, Pennsylvania and other States; and lands injuriously affected, as in England. (Hannibal Bridge Co. vs. Schaubacher, 49 Mo., 555; Parker vs. Boston & Maine R. R. Co., 3 Cush., 107; Dodge vs. Essex, 3 Met., 380; Ashby vs. Eastern R. R. Co., 5 Met., 368; Imlay vs. Union Branch R. R. Co., 26 Conn., 249; Palmer Co. vs. Ferrill, 17 Pick., 58; Dorlan vs. Eastern Branch & Waynesburg R. R. Co., 46 Penn. St., 520; Watson vs. Pittsburg & Connellsville R. R. Co., *Id.*, 480; East & West Indian Docks & Birmimgham Junction R. R. Co., vs. Gattke, 6 Eng. R. R. Cases, 283; The Queen vs. Eastern Counties Rl'y Co., *Id.*, 539; Lawrence vs. The Great Northern Rl'y Co., 6 *Id.*, 495; Lafayette Plank Road Co. vs. New Albany & Salem R. R. Co., 13 Ind., 93; Newcastle & Richmond R. R. Co. vs. Penn. & Indianapolis R. R. Co., 3 Penn., 464; Hooker vs. New Haven & Northamp-

ton Co., 14 Conn., 146; Baltimore & Potomac R. R. Co. vs. The Trustees of Sixth Street Presbyterian Church, Cent. Law Jour., p. 145; Toledo, Wabash & Western Rly. Co. vs. Morrison, decided Spring Term, 1874, Sup. Ct. of Ill.)

II. The true question was, how much damage was done to the respondent by the establishment, erection and maintenance of said approach to said bridge over the lot on the east side of Craig's Alley. (Robb vs. Maysville & Mt. Sterling Turnpike R. Co., 3 Met.. [Ky.] 117; Moeller vs. St. Louis & I. M. R. R. Co., 31 Mo., 262.)

The intervening of Craig's Alley between the lot on the east side and the brewery building on the west side of said alley does not preclude the respondents from recovering the damages done to the brewery property. The brewery property was an entirety.

WAGNER, Judge, delivered the opinion of the court.

When this cause was here before (49 Mo., 555) the judgment of the Common Pleas Court was reversed, because it held the finding of the commissioners conclusive, and refused to hear any evidence when the exceptions were filed. When the case was again called for a hearing, under a recent statute of this State, a jury was demanded and impaneled.

The facts now are the same as they were then. Defendants owned two lots in the city of Hannibal, situated immediately under the bluff on the Mississippi river. These lots were separated by Craig's alley. On the lot west of the alley a brewery was erected and in operation, and on the lot east of the alley, which was bounded by the river, was a malt house, horse power, pump and pipe. From this pump the pipe ran westward under the soil of the alley and was connected with the brewery, and by it the brewery was supplied with water.

Plaintiffs, by a proceeding under the statute, condemned and appropriated the eastern lot, causing an entire destruction of the malt house, horse power and water pipe, and thereby effectually precluded the defendants from using or operat-

ing the brewery. Damages were claimed for the injury done to both pieces of property.

The court submitted issues to the jury, in substance as follows: 1st. What was the value of the lot lying east of Craig's alley, belonging to the defendants, and sought by plaintiffs to be appropriated to their own use as a railroad bed? 2d. Were the defendants, as owners of the lot west of Craig's alley with the improvements thereon, damaged by the appropriation of the ground east of the alley for the construction and maintenance of plaintiff's railroad? If so, how much? The jury found both issues for the defendants, and assessed separate damages for each lot.

To the submission of the second issue, the plaintiffs excepted, on the ground that they were not liable for damages to the property west of the alley. Their position seems to be, that the operation of the malt grinder, horse power, pump and pipe on the lot east of the alley, did not entitle the defendants to a claim for damages to the property west of the alley, because the defendants owned no interest in the soil of the alley, and the two parcels of land were completely dissevered. But this objection cannot be sustained. It is erroneous in reference to the ownership of the fee in the alley, and gives entirely too narrow a construction to the statute as regards the damages recoverable in behalf of those who suffer injury on account of their property being appropriated. The owner of land joining on a street, alley or public highway, owns the fee to the center thereof, subject to an easement in the public, and as the defendants owned on both sides, their fee extended to the whole alley.

The statute requires the commissioners "to assess the damages which the owner of the land may sustain by reason of such appropriation." This by no means confines the assessment to the land actually taken. That may constitute the smallest amount of the injury done. There may be consequential damages which result by reason of the appropriation fairly comprehended within the scope of the law, and this case furnishes a strong illustration. Such is the construction placed upon similar statutes in other States.

The Massachusetts statute, though using different language, is in spirit the same. It declares, that "every railroad corporation shall be liable to pay all damages that shall be occasioned by laying out and making and maintaining their road, or by taking any land or materials, etc.

In the case of Parker vs. The Boston & Maine Railroad, (3 Cush., 107) the plaintiff sought to recover consequential or incidental damages for an injury done to his land, lying near the track, but not touching it. Shaw, Ch. J., delivered the opinion of the court, and after referring to the statute said, "This is a remedial provision, and to be construed liberally to advance the remedy. It is made in the spirit of the declaration of rights, giving compensation to persons sustaining damage for the public benefit. Whatever this provision, by its true construction, declares that the party damnified shall receive, the company, by accepting a railroad charter, bind themselves to pay.

"The terms of the section must include something else besides taking lands and materials, because damages of that kind are distinguished from the former by the word 'or.' So the word 'occasioned,' points to any damage which may be directly or indirectly caused by the railroad. We are of the opinion, therefore, that a party who sustains an actual and real damage, capable of being pointed out, described and appreciated, may sue a complaint for compensation for such damages." Our statute gives whatever damage is sustained by reason of the appropriation of the land, and the Massachusetts statute gives damages that are occasioned by the laying out and making and maintaining the road. It is obvious that it is simply the employment of different language to express the same meaning. Therefore, there was no error in the ruling of the court on this point.

The next question to be considered, has reference to the measure of damages. The defendants introduced witnesses whose evidence tended to prove the value of the brewery, and that by reason of plaintiff's appropriation of the ground east of the alley, the brewery was rendered valueless, unless

the malt mill, pump and horse power should be placed in operation on the west side of the alley. They also introduced testimony tending to prove the expense of a transfer of the works to their property west of the alley, and restoration of water communication with the river, but the court of its own motion interposed and prohibited the further introduction of this character of testimony, and subsequently ruled it all out. The plaintiff made no objection to the testimony, but sought the privilege of introducing counter testimony on the same point. It undertook to prove by witnesses that the property on the east side of the alley was easily transferrable, to the property on the west side of the alley, so as to maintain communication with the river, and that this could be accomplished at a moderate expense. But the court peremptorily refused to hear any evidence on the subject, and this is assigned for error.

It is in many cases a matter of great difficulty to so adjust the measure of damages as to do exact justice to both parties. An approximation only can be arrived at.

In a negligent injury to real property, the general rule is to allow the plaintiff the difference between the market value of the land immediately before the injury occurred, and the like value immediately after the injury is complete, and not to take into consideration the cost of repairing the injury so as to replace the land in its former condition. (Shearm. & Redf. on Negl., § 602.)

But this rule is not universally applied, and must be taken with many qualifications. Where the injury could have been repaired at an expense much less than the depreciation in the market value of the whole land, the plaintiff in some cases is only allowed to recover the expense of such repair. Thus, in Waters vs. Brown, (44 Mo., 302) which was an action under the statute for damages to plaintiff's premises caused by the firing by defendant of a prairie, it was held that the rule for assessing damages would be the value of plaintiff's rails lost and destroyed by fire, and the loss of the use of the land during the time that was reasonably necessary to procure other

rails and rebuild the fence. And this would of course include the necessary expenses of replacing the fence.

Although in the present case the injury happened and the damage was sustained by virtue of a statutory authority, it is believed that the same rule would be the better doctrine. Where nothing but compensatory damages are given, the general rule is, that the recovery must be confined to the actual damage sustained.

In an action of covenant by the lessee against the lessor for failing to build a sufficient wall in accordance with his covenant, the lessee can recover such damages only as are direct and immediate, but not remote, speculative or contingent, which might have been avoided by his own act. The proper measure of damages would be the cost of repairing or building the wall, and compensation for the use of the premises of which he was deprived while they were undergoing repairs. (Fisher vs. Goebel, 40 Mo., 475.) Though the case at bar is not precisely analogous to one just alluded to, still the application of the same principles would subserve the ends of justice. After the appropriation of the land on the east side of the alley, on which the malt house, horse power, pump and pipe were situated, the brewery, which the evidence shows was very valuable, was rendered worthless. The amount of damages then would have been nearly equivalent to the whole value of the brewery. But if these fixtures and appliances could have been transferred to the western side of the alley and placed in such a situation that the brewery could have been just as effectively operated as it was before, then the actual loss to defendants would have been the trouble and expense of making the removal.

This then, we are inclined to think, would be the proper and appropriate measure of damages, viz: the cost and expense of removing the malt house, horse power, pump and pipe to the west side of the alley, so that they could be used as effectively and advantageously for running the brewery as it was rûn before, to which should be added compensation for the use of the brewery for what time it would have been

necessarily idle, whilst the change and transfer were being made.

Because the court erred in refusing to hear proper testimony on the question of damages, the judgment will be reversed and the cause remanded. The other judges concur.

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JOSEPH T. CALDWELL, Respondent, *vs.* JACOB STEPHENS, *et al.*, Appellants.

1. *Practice, civil—Instruction assuming facts will not warrant reversal, when.*—An instruction which assumes as true, a fact in issue, is wrong; but where the evidence is clear and conclusive as to such fact, and there is no contradictory testimony, the giving of such instruction will not warrant a reversal of the cause.
2. *Ejectment—Verdict in—Possession of defendant—Finding as to.*—Under the statute relating to ejectment, (Wagn. Stat., 559, § 8,) the verdict of a jury that the right of property and right of possession is in plaintiff, is insufficient where defendant's possession at the time of commencing suit is denied in his answer.
3. *Judgment—Void for uncertainty as to parties.*—In a suit against two defendants, a judgment against "the defendant" is void.
4. *Judgment against married woman.*—A general judgment for damages and costs against a married woman is improper.

Appeal from Clark Circuit Court.

Dryden & Dryden, for Appellant.

Givens & McKee, C. B. Matlock, and J. G. Blair, for Respondent.

VORIES, Judge, delivered the opinion of the court.

This is an action of ejectment, brought originally for the recovery of four-ninths of a tract of land named in the petition; but, during the progress of the case, the plaintiff abandoned all claim to the land except as to one-ninth part thereof.

The action was commenced by the plaintiff against Jacob Stephens only, the defendant Margaret Stephens the wife of said Jacob, having been made a party during the progress of the case at her own request.

The defendants file separate answers. The defendant Margaret J. Stephens states that she is the wife of her co-defendant; denies the title of the plaintiff to the land in question; says that she is the owner in fee of the land and has possession in her own right adversely to plaintiff and all others.

The said defendant, as a further defense, avers that she and those under whom she claims have had and held, actual, exclusive, open, absolute and uninterrupted possession of said premises for ten years continuously next before the commencement of the suit, and denies any possession on the part of the plaintiff or those under whom he claims during the same period, and relies on the statute of limitations. And as a further defense, said defendant avers, that she purchased said land of John W. Perkins; that said Perkins, on the 21st day of November, 1853, purchased said lands of G. W. Sheckells and others; that the plaintiff, Caldwell, was present and advised and directed the purchase by said Perkins, and wrote the deed, assuring Perkins that the title was good, and that he would acquire a good title to the land; that Perkins was ignorant as to said title, but relied on plaintiff's representations, and in good faith purchased the land; that Perkins afterwards, at the solicitation of the plaintiff, purchased in a tax title to said land, plaintiff representing to said Perkins that the purchase of said tax title would give him a perfect title to the land when taken in connection with his former deed. Wherefore, defendant insists that plaintiff is estopped from denying the title of said Perkins or of defendant who claims under him.

The defendant, Jacob Stephens, denies the plaintiff's title, as set forth in the petition; denies that he is in possession of the land, or that he ever withheld the premises from the plaintiff; after which he relies on the title of his wife, setting up substantially the same defenses relied on by his co-defendant.

A replication was filed, putting in issue the affirmative allegations of the answer. And as to that part of the answer which relies on the bar of the statute of limitations, the plaintiff replies, that he claims title under a deed executed

by Jabez Brown and his wife Elizabeth, that said Elizabeth is a daughter and heir of one Peter Sheckells, who has long since been dead, and who died seized of the land in controversy; that said Elizabeth was a married woman at the time of the death of her father and so remained up to the year 1871, at the time she conveyed the land to the plaintiff.

On the trial, the plaintiff abandoned all claim to the land named in the petition except as to one undivided ninth part of said land which was purchased by him from one Jabez N. Brown and Elizabeth Brown his wife. He then, to sustain the issues on his part, produced evidence as follows:

1st. A patent from the United States conveying the tract of land named in the petition to one Peter Sheckells, dated the 1st day of August, 1838. The plaintiff then read in evidence the deposition of Jabez N. Brown, by which it is shown, that witness and Elizabeth H. Sheckells were married in the year 1849, in Randolph county, Missouri, that said Elizabeth is a daughter of Peter Sheckells; that witness and his said wife sold to J. T. Caldwell all of the wife's interest in a quarter section of land in Clark county, Mo., as heirs of Peter Sheckells; that the consideration received for their interest in the land was fifty-five dollars. The witness also stated that something near twenty years since, one John W. Perkins had been to see witness and his wife with a view to purchase their interest in the same land conveyed to Caldwell, but that they had refused to sell the land to Perkins, and had never promised him the land on any consideration or under any circumstances whatever.

The plaintiff then read in evidence a deed from Jabez N. Brown and Elizabeth Brown his wife, dated March 30th, 1871, which deed purported to convey the interest of Brown and wife, in the land in controversy, to plaintiff.

The plaintiff next read in evidence the deposition of Mrs. Elizabeth C. Sheckells. It is shown by this deposition that the witness is seventy-two years old and is the widow of Peter Sheckells; that Peter Sheckells had nine children; that Elizabeth Brown is one of them; that Elizabeth was married to

her present husband Jabez N. Brown, in the year 1849, (Oct. 9th); and that she and her husband are still living; that Peter Sheckells died October the 9th or 10th, 1849.

The plaintiff then introduced evidence tending to prove the value of the rents and profits of the land in controversy and closed the evidence on his part.

The defendants on their part offered in evidence a deed purporting to be from Geo. H. Sheckells and others dated November, 21st, 1853, to J. W. Perkins, purporting to convey the land in controversy to said Perkins; said deed being offered as color of title and as defining the extent of defendant's claim. The court admitted the deed to be read as color of title, remarking that its effect and extent would be regulated by instructions.

The defendant then offered in evidence a certified copy of a deed commonly called a tax deed, executed by Allen P. Richardson, register of lands, to one Thomas D. Ford, for the land in controversy. This deed was objected to by the plaintiff because said deed failed to show how said land was advertised for sale by the Register of lands. The recital in the deed being as follows: "And the Register of lands of said State, having on the first Monday of June, A. D., 1847, advertised the said real estate for sale according to law" &c. The court sustained the objection and the deed was rejected as evidence of title in defendants, and the defendants excepted. The court then permitted said deed to be read as color of title; but not as showing the limits of the defendant's claim. The deed was then read for that purpose and is in about the usual form.

The defendant then read in evidence a deed from T. D. Ford to J. W. Perkins, dated December, 7th, 1853, for the same land; next a deed for the same land from J. W. Perkins to defendant, Margaret Stephens, dated 30th April, 1864, and then introduced evidence which tended to prove the special defenses set up in their answer, and closed the evidence.

There were several objections made and exceptions saved to the rulings made by the court in receiving and excluding evidence during the trial; but no point is made on such exceptions in this court, for which reason they have not been noticed in the statement of the case.

The court instructed the jury, at the request of the plaintiff, as follows:

"1st. The patent read in evidence, conveyed the title of said land to Peter Sheckells, and upon the death of said Sheckells, his children and heirs were tenants in common, and if they shall believe that Perkins took possession of said land, claiming under a part of said heirs, then said Perkins and Mrs. Brown were tenants in common, and the possession of said Perkins was also the possession of Mrs. Brown; unless said Perkins claimed the same adversely to Mrs. Brown, and unless the jury so believe, then plaintiff is not barred by the limitation."

"2nd. If the jury believe from the evidence, that Mrs. Brown is one of the children and heirs of Peter Sheckells; that she was married to Jabez Brown in 1849; and that Perkins took possession of said land in 1853; and that Mrs. Brown continued to be a married woman up to the time of the conveyance to Caldwell, then the statute of limitations is no bar of the plaintiff's action in this case."

"3rd. Whatever tax title Perkins acquired to the land in controversy, enured to the benefit of Mrs. Brown, they being tenants in common of said land."

"4th. Even should the jury believe, from the evidence, that plaintiff induced Perkins to purchase the land in controversy, yet, if Caldwell only represented that the deed of Sheckells conveyed the interest of those signed to it, and that the Ford tax title would make his (Perkins) title as good as a government title, and that Perkins had consulted a lawyer who had told him the tax title was not good, and that Caldwell did not have any interest in the land at that time, then Caldwell is not estopped, by such representations, from bringing this suit.

if such representations were made in good faith without any intent to defraud or injure Perkins."

"5th. If the jury believe from the evidence that all the representations that were made by Caldwell, as to the validity of Perkins' title, were made in regard to the interest of the five heirs, purchased by Perkins, and not as to the interest of Mrs. Brown, then the jury will find for the plaintiff, if the jury also find that Mrs. Brown was a married woman at the time Perkins took possession of said land, and continued to be such up to the time she conveyed to Caldwell."

"6th. If the jury find for the plaintiff, they will also allow him one-ninth of the reasonable rents and profits of said land from March, 1871, the date of Caldwell's deed from Mrs. Brown and husband."

The defendants, at the time, objected to each of the foregoing instructions, and saved their exceptions.

The defendants then asked the court to give the jury a number of instructions, all of which were refused, but as no point is raised on said instructions in this court, they need not be further noticed.

The jury returned a verdict for the plaintiff, which was in the following words: "We the jury find the right of property and right of possession in and to 1-9 of the property described in the petition, in the plaintiff, and assess his damages at the sum of seventy-one dollars. And we find the monthly value of rents and profits at $2.11-12. Alfred King, foreman."

Upon this verdict the court rendered a judgment against the defendant (without saying which of the defendants) for the possession of the land and for the damages, &c.

The defendants in due time filed their motion for a new trial, which being overruled by the court, they appealed to this court. The first objection insisted on by the defendants in this court is, that the court erred in giving the jury the first instruction asked for by the plaintiff. It is insisted that the court by said instruction assumes that Elizabeth Brown, the grantor of the plaintiff, was one of the children and heirs of Peter Sheckells, when the question whether she was a child

of Sheckells or not, was a question to be submitted to the jury. It was certainly necessary for the plaintiff, in order to a recovery in the case, to prove by the evidence that Mrs. Brown was one of the heirs of Peter Sheckells, and that fact should have been submitted to the jury with the other facts in the case, and not assumed by the court.

In this case, however, the evidence was very clear and conclusive on that subject, to the effect that Mrs. Brown was one of the children of Sheckells, and there is no pretense of any contradictory evidence on that subject.

Under this state of facts the court seems to have taken that fact as conceded, and in the instruction assumed it to be true. This was certainly wrong in strict law and practice, but under the circumstances of this case, we might not reverse the judgment for that error alone. (Barr vs. Armstrong, 56 Mo., 577.)

It is next insisted that the third instruction given by the court was also erroneous. By that instruction the jury are told "that whatever tax title Perkins acquired to the land in controversy enures to the benefit of Mrs. Brown, they being tenants in common of said lands."

This instruction is subject to the same objection that is taken to the first. It assumes that Mrs. Brown is an heir of Sheckells, and therefore a tenant in common in the land with Perkins, the grantor of defendants. And the instruction is further objectionable in this, that the tax deed had been excluded as evidence of title, and was only admitted by the court as color of title, the court at the time remarking, that the deed could not be admitted to show the extent of the defendants' claim.

It is difficult to see the object which the court had in view in admitting this deed in evidence as a color of title, and at the same time holding that it was incompetent to show the extent to which the defendants claimed, so as to show the extent of their possession in support of the plea setting up the bar of the statute of limitations. The very object of showing a colorable title, it seems to me, is to extend the possession beyond that part of the land in the actual occupation

of the party. But be that as it may, it was certainly out of place to instruct the jury in reference to any title which might be acquired by virtue of a deed that had been excluded from the evidence in the cause, for any such purpose.

The main and most material ground of objection made by the defendants, grows out of the verdict and judgment. It is contended by the defendants, that the verdict is not sufficient to authorize the judgment rendered, or in fact to authorize any judgment for the plaintiff in the case. The verdict finds that "the right of property and right of possession in and to 1-9 of the property described in the petition is in the plaintiff," and then assesses his damages at the sum of seventy-one dollars, &c.

The 8th section of our statute concerning the action of ejectment, (Wagn. Stat., 559) provides that, "to entitle the plaintiff to recover, it shall be sufficient for him to show that, at the time of the commencement of the action, the defendant was in possession of the premises claimed, and that the plaintiff had such right to the possession thereof as is declared by this chapter to be sufficient to maintain the action." It will be seen that the verdict in this case finds only one of the facts required by the statute to be proved by the plaintiff to authorize a recovery. There is no finding that the defendants were in possession of the property when the action was commenced, or at any time.,

A general verdict for the plaintiff on the whole case might have been good; but here only one single fact is found which of itself is not sufficient to authorize a recovery.

It is insisted by the plaintiff, that the defendant, Margaret J. Stephens, by her answer admits her possession of the premises at the time the suit was commenced, and that, therefore, no finding by the jury was necessary on that subject. It is true that defendant, Margaret J. Stephens, admits her possession in her answer, and it is equally true that Jacob Stephens, the other defendant in his separate answer, denies his possession of the premises. How is the court, under such circumstances, to know how to render the judgment?

The judgment rendered in this case, upon the verdict, is wholly uncertain It is a judgment against the defendant for the recovery of the possession of the premises and for the damages, &c. If it is to be considered as a judgment against both defendants, it is certainly wrong as to Jacob Stephens, who has denied the possession of the premises, and there is no finding against him as to that fact, and a general judgment against Margaret for the damages and costs would be improper for she is a married woman, against whom no general personal judgment could be rendered. If the judgment is only intended to be a judgment against one of the defendants, it cannot be told which is intended. We think that the verdict is insufficient and the judgment improper.

The judgment will be reversed and the case remanded. Judge Wagner is absent, the other judges concur.

DON MCGREGOR, Respondent, *vs.* WILLIAM LEIGHTON, Appellant.

1. *Justices' courts—Appeal—Notice—Appearance.*—Where an appeal is taken from a justice of the peace on a day subsequent to that of the judgment, the appellant will not be excused for failure to notify the appellee by reason of irregular entries made by the clerk at the return term of the Circuit Court, when no appearance is entered by the appellee, and no record entry is made to that effect.
2. *Judgment—Appeal—Error of counsel.*—A judgment cannot be reversed because an attorney in reading the word "defendant" in the minutes, mistakenly understood it to be intended for "plaintiff."

Appeal from Adair Circuit Court.

Harrington & Cover, for Appellant.

Griggs & Risdon, for Respondent.

LEWIS, Judge, delivered the opinion of the court.

Plaintiff obtained judgment before a justice of the peace, from which, on a day subsequent to that of the trial, defend-

ant took an appeal to the Circuit Court. No notice of the appeal was ever given. At the return term, the cause was continued by the Circuit Court, and at the next term, plaintiff obtained, on motion, an affirmance of the judgment, for failure to prosecute the appeal.

The case differs in nothing from those in which this court has so often held that a judgment rendered under such circumstances must be affirmed, except as to the following facts which the appellant insists, should effect a different result. It is stated in the bill of exceptions that when the plaintiff's motion for affirmance was under consideration, the defendant offered to prove that on the last day of the next preceding term, "the court permitted the clerk to take the trial docket to a side room, while the court was trying another case, and call the return docket, and this case among the rest; and that the order of record was made at that time, and that the attorneys of defendant understood that the order so made was an order entering the appearance of the appellee, and that the attorneys of the defendant were misled by said order, supposing it was an order, entering the appearance of the plaintiff. And also offered to show that defendant did not authorize the clerk to make an order entering the appearance of defendant, as he was appellant, and no order was required, and that for reasons stated, there was no notice given." This testimony was excluded by the court. The entry referred to as made by the clerk is in the following words: "Now defendant enters his appearance, and the court continues this cause."

We can perceive no error in these proceedings. Much as we may be struck by the singularity of the court's delegating its functions to the clerk—if such were the fact—to be by him exercised in a place where the court itself was not visibly present, we yet fail to discover how the proof of such circumstances could clear up the charge of laches against the defendant. If the clerk made a wrong entry, he might just as naturally have made it under the eye of the court. And if the entry was a nullity, as the defendant seems to main-

tain, it could not make his case any better. The defendant did not offer to show that the plaintiff in fact appeared, or that he authorized an entry to that effect. Nothing but such a fact, or such an entry could excuse the defendant's failure to give the notice before the following term. And if the plaintiff did not appear, and the clerk's entry did not say that he had done so, we cannot grasp the process by which these omissions convinced the defendant that the affirmative was true of either proposition. The entry said that the defendant appeared. The defendant's attorney read this, and proceeded to risk their case on the assumption that it meant the plaintiff, and not the defendant. The intellectual subtleties which evolve such conclusions, lie too deep for judicial cognizance.

It would be a disastrous precedent to reverse a judgment because an attorney had failed to read with sufficient care the record entries in his case, or had mistaken the meaning of words in every day use. The judgment must be affirmed; the other judges concur.

THE QUINCY, MISSOURI & PACIFIC R. R. CO., Appellant, *vs.* CHARLOTTE RIDGE, *et al.*, Respondents.

1. *Condemnation of land—Personal examination.*—In a proceeding for condemnation of right of way for a railroad, upon exceptions to the commissioners' report, it not appearing from the record, whether the fact of a personal examination of the land by the commissioners was in issue, the Supreme Court cannot say there was error in the rejection of proofs that the commissioners went upon the ground and viewed it.
2. *Condemnation of land—Evidence—Presumption.*—There is no error in the exclusion of testimony for the purpose of sustaining the commissioners' report, to the effect that they were instructed in their duties by the adverse attorneys. The matters of inquiry for the court are; what did the commissioners do in fact, and upon what principles did they arrive at the conclusions reported? Nothing appearing in the record to show how this inquiry was conducted, the action of the court below, in setting aside the report, will be presumed correct.
3. *Condemnation of land—Reference—Jury.*—Under the act approved March 8, 1873, when the report of commissioners is set aside, the court is authorized to refer the matter to a jury.

4. *Condemnation of land—Damages.*—In estimating the damages in condemnation for right of way, the jury are to consider the quantity and value of the land taken and the damage done to the whole tract; and from these amounts to deduct the benefits, if any, peculiarly accruing to that tract of land, and not shared by it in common with other lands in the neighborhood.

5. *Condemnation of land—Damages.*—In condemnation for right of way, the actual value of the land taken is not the measure of damages.

Appeal from Adair Circuit Court.

DeFrance & Halliburton, for Appellant.

H. F. Millan, for Respondent.

Lewis, Judge, delivered the opinion of the court.

This was a proceeding under the general statutes to condemn a strip of ground through defendant's land for the track of the plaintiff's railway. Commissioners were appointed and made their report, assessing the damages at $50. Defendants filed their exceptions, which were sustained by the court, and the award being set aside, a jury was impaneled to make a new appraisement. This resulted in an assessment of $325, and judgment accordingly; from which, after unsuccessful motions for new trial and in arrest, the plaintiff appealed.

It is claimed for error, that the court, in considering defendants' exceptions to the report, improperly rejected plaintiff's offer "to prove by the commissioners that they were properly instructed; that they went upon the ground in person and viewed it, and that attorneys for the defendants were along and instructed them as to their duty in the premises." We are not advised how this testimony, if admitted, could have influenced the action of the court. The evidence introduced is not preserved for our inspection, so that we have no means of knowing whether the fact of personal examination of the land by the commissioners was in issue. It was, in any event, immaterial how the commissioners were advised to act, by attorneys or others. The point of inquiry was, how did they act, and upon what principles did they, in fact, arrive at the conclusions reported by them? Nothing

being here to show us in what manner that inquiry was conducted by the court, all the presumptions are in favor of its adjudication.

It is objected that the court had no authority, upon setting aside the report, to refer the matter to a jury. The act approved March 8th, 1873, (Sess. Acts, p. 24,) which was then in force, and made applicable to cases pending, expressly authorized that method of procedure.

At the instance of defendants the court instructed the jury thus: "In estimating the damages to the land in controversy, the jury will consider the quantity and value of the land taken by the railroad company for a right of way and the damages to the whole tract by reason of the road running through it; and deduct from these amounts the benefits, if any, peculiar to the said tract of land, arising from the running of the road through the same. And by peculiar benefit to that land, is meant, such benefits as that land derives from the location of the road through it, as are not common to the other lands in the same neighborhood."

This instruction was in substantial conformity with the principles declared in former decisions by this court, and was properly given. (Pac. R. R. Co. vs. Chrystal, 25 Mo., 544; Lee vs. Tebo & Neosho R. R. 53 Mo., 178.)

The court properly refused to instruct the jury, as asked by the plaintiff, that the measure of damages was the actual value of the real estate taken. The authorities cited to show that this was an erroneous ruling, have no application to proceedings in condemnation for right of way. Soulard vs. The City of St. Louis, 36 Mo., 546, and Jamison vs. The City of Springfield, 53 Mo., 224, were suits by the land owners against the corporations, respectively. In each it was held, that by the nature of the action and statements in the petition the plaintiff waived compensation for damage done by the location of the street to the property not taken. Hence, there could be no recovery, except for the value of the land occupied.

We find nothing in the record to justify an interference with the disposition of this cause by the Circuit Court. The amount of the damages, as assessed by the jury, was considerably below the estimates of nearly all the witnesses. With the concurrence of all the judges, the judgment will be affirmed.

October Term, 1874, at St. Louis is continued in Vol. lviii.

*APPENDIX.

Ex Parte JAMES E. MUNFORD Petitioner in *Habeas Corpus.*

1. *Demurrer sustained, effect of—Suit still pending.*—When a demurrer to a petition is sustained with leave given to amend, the suit is still pending until other and final action. Either party may take depositions without waiting for further pleading.
2. *Taking depositions—State of pleading.*—The taking of depositions, under the statute, has no necessary reference to the state of the pleadings at the time of the taking. It is a provision against contingencies, for the possible condition of the cause at the time of trial. It is not essential that the notary be acquainted with the issues, or that there be in fact any issues; provided, only, that the cause has been regularly instituted and is not finally disposed of.
3. *Witness—What no ground for refusal to testify.*—It is no ground for a witness' refusal to testify, that his testimony is sought for the purpose of making a civil case against him. Every man's knowledge of facts which may be material to the administration of justice is, subject to certain exceptions of personal privilege, the property of the law.
4. *Witness—Notary Public may enforce attendance of.*—If a suit be pending, a notary public may enforce the attendance of witnesses to give their depositions, and may compel them by imprisonment to answer any questions not violative of personal privilege. But the officer cannot exercise such powers if no suit be pending; and this fact may be inquired into in a proceeding upon *habeas corpus.*

J. E. Jones & J. M. Holmes, for Petitioner.

Cline, Jamison & Day, and T. W. Stratton, and E. W. & E. R. Tittmann, Contra.

LEWIS, Judge:—

The petitioner avers that he was subpœnaed to appear before C. P. Ellerbe, a notary public, and give his deposition in a cause alleged to be pending in the St Louis Circuit Court, wherein Alexander Turnbull and others were plaintiffs and James E. Munford and others defendants. That upon his failure to obey the subpœna, he was compelled by attachment

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*The above opinion was delivered at Chambers, and is therefore no part of the official reports included in this volume. But the subject matter being of much interest to both the bar and the judiciary of the State, and the statutory provision principally involved having had no judicial interpretation hitherto, the publisher has yielded to a generally expressed wish among leading members of the profession, in making this *addendum* on his own responsibility and at his own expense.

W. J. GILBERT, Publisher.

to appear; but then declined to testify or to answer any of the questions propounded, because there was, in fact, no such suit pending as alleged, within the meaning of the statute which authorizes the taking of depositions. That thereupon he was committed to jail by the notary, from which incarceration he here demands to be released, upon the same ground which was the basis of his refusal to testify.

The statute provides that "any party to a suit pending in in any court in this State may obtain the deposition of any witness, to be used in such suit, conditionally." (Wagn. Stat., 522.)

It appears from the testimony that a suit was instituted in usual form in the court and between the parties above mentioned, but a demurrer to the petition, for failure to state a cause of action, and for other objections, was sustained by the Circuit Court. That leave was given the plaintiffs to file an amended petition within thirty days, which period has not yet expired. That no amended petition has yet been filed. It is claimed, therefore, that there is no "suit pending" within the meaning of the statute.

The argument is pressed with much ability, that there cannot be a suit, without a cause of action; that a cause of action can only appear in a sufficient petition; and that, the court having pronounced the petition insufficient, and the plaintiffs having abandoned it in obtaining leave to amend, there is therefore no petition in the case, and, necessarily, no suit about which testimony can be taken.

I am unable to yield to the force of these positions in the face of the law as I find it. It may have been very unwise in the legislature to open a door for the taking of testimony when neither the notary nor the witness can know what facts are to be tried. And yet almost every application of the statute abounds with such results. Our Supreme Court has decided that a deposition may be taken when the defendant's property has been attached and before summons served or publication made. At such a stage of proceedings it is impossible to know what facts will be denied, or whether a sin-

gle word of the testimony taken will be applicable to the issues as ultimately framed. In *Ex parte* McKee, (18 Mo., 599), the court comments on the impracticability of similar suggestions, where the officer "cannot know the aspect which the case will probably assume at the trial." Even if the issues are framed when the deposition is taken, they may be wholly changed before it can be used on the trial. I think the entire argument is based on an erroneous view of the policy of the statute concerning depositions. It has no reference, as I understand it, to the state of the pleadings or any other existing condition of the cause in court. Its object is to secure testimony for the case in its future condition, whatever that may or may not be, at the time of trial. It is intended to guard against the contingencies of death, disease, or removal of witnesses before the trial is reached. Hence the law only requires that the suit shall be pending. The institution of the suit is the only guaranty demanded of the plaintiff's earnestness. He may then take the deposition. But every question of its necessity or admissibility, for whatever reason, is specially reserved for the trial court to pass upon at the proper time. Formerly, the statute authorizing depositions stipulated, as a pre-requisite, that the testimony should be "necessary" in the cause. It might then have been plausibly argued that testimony could never be necessary, in the absence of any petition for it to sustain. But in 1835, this condition was stricken out, and from thence hitherto nothing has been required but that a suit should be pending.

These considerations leave us no excuse for attempting to strain the words of the statute aside from their plain, literal meaning. What is a "suit?" Whatever it may have been formerly, it is now, according to Chief Justice Marshall, understood to be "the prosecution of some demand in a court of justice." Here, Turnbull and others, plaintiffs, came into the Circuit Court with a demand against the defendants. Have they failed to prosecute it? By no means. When told by the court that the form in which it was presented was insufficient to be entertained, they did not go out of court, or

abandon their demand, but at once proposed to follow it up in an amended petition. The court told them they might do this at any time within thirty days. Surely they could lose no advantage by taking the court at its word. They rightly considered themselves still in court, prosecuting their demand and failing in nothing, until the thirty days should expire without an amended petition filed. Their *suit* is in court, whatever may be said of the original petition, and whether this is abandoned or otherwise.

The history of every suit is comprehended in three stages: its institution, its pendency and its determination. When once instituted it is thenceforward pending, in every instant of time, until finally disposed of. As expressed by the superior court of New Hampshire, the term "pending" means nothing more than "remaining undecided." In Maine, where the statute is similar to ours, it was held that a case was "pending," so as to authorize the taking of depositions, even where a non-suit had been entered, but with leave to have it taken off if the plaintiff would appear on the first day of the succeeding term. Said the court: "The suit must be regarded as pending from its first institution until its final termination." (Brown vs. Foss, 16 Me., 257.) In an English chancery case, the complainant's bill was dismissed; and yet the suit was held to have been still pending, because sometime afterwards an appeal was taken to the House of Lords. (Gore vs. Stacpoole, 1 Dow., 31.)

I find no escape from the conclusion that the suit of Turnbull and others vs. Munford and others was pending, literally and within the meaning of the statute, when the notary sought to take the petitioner's deposition. The latter complains that the only object is to elicit facts from which to make a case against him. If this be so, it is a peril against which neither the constitution nor the statute has undertaken to protect him. It is well understood that a witness can never refuse to testify, on the ground that his testimony may render him liable to a civil action. In this case the witness is certainly no worse off than he would be if a petition were

on file, legally sufficient on its face, and yet, in his estimation untrue and fictitious in all its allegations, and intended only as a snare. Would he claim, in the latter case, that the truth of the petition must first be established in order to authorize the taking of his deposition for the very purpose of establishing the same thing? Every man's knowledge of facts which may be material to the administration of justice is, subject to certain exceptions of personal privilege, the absolute property of the law, and may be demanded of him under the forms prescribed, without any reference to his convenience or his profit or loss.

As to all other matters of inquiry in this proceeding, I consider them settled by the opinion of our Supreme Court in *Ex parte* McKee, (18 Mo., 599.) After quoting from the several statutes relating to habeas corpus, witnesses and depositions, Judge Gamble proceeds to say: "A notary public, then, being authorized to take depositions, and having the same powers for that purpose as are conferred on justices of the peace, may summon a witness before him, and enforce his attendance, if he fails to attend; and if he attends and refuses to give evidence which may lawfully be required to be given, the notary may commit him to prison until he give the evidence. As to what evidence "may lawfully be required" on such occasions, the court declares this to embrace every question "which is not his *personal privilege* to refuse to answer." It is not claimed in this case, as it was not in that, that any question of personal privilege is involved. The court in that case refused to issue the writ.

Upon the authority of that decision, I might have refused to issue the writ in the present case, but for the allegation in the petition, that "no such cause was pending as alleged." Taking that allegation as true for the purpose intended. I was disposed to construe every doubt in favor of the liberty of the citizen, and so not to apply Judge Gamble's opinion to a case in which the notary had never acquired any jurisdiction of the subject matter. He is an officer of strictly defined powers, and cannot take a deposition at all, unless there be a

suit actually pending in some court. But I find the allegation on that point disproved by the testimony, and hence, I have no course left me but to remand the petitioner whence he came.

INDEX.

ABATEMENT; See Practice, civil—Actions, 1; Practice, civil—Pleading, 5.

ACKNOWLEDGMENT; See Conveyances, 6; Husband and Wife, 3.

ADJOINING PROPRIETORS; See Contracts, 1; Fences, 2; Land and Land Titles, 10, 11.

ADMINISTRATION.

1. *Administrator's sale—Land purchased by Judge—Report of sale, etc.*—An administrator's sale and deed of land are not rendered invalid by reason of the fact that another and distinct tract, sold at the same sale, was purchased by the probate Judge, contrary to law, and that the same report, reciting both sales, was approved by the Probate Court.—Bacon v. Morrison, 68.

2. *Sheriff's deed—Recitals as to judgment in favor of administrator.*—The record entry of a judgment recited its rendition in favor of A. and B. The execution recited judgment of same date for same sum and against same defendant, but in behalf of A. & B., as administrators, and alleged that their letters had been revoked, and that execution had been ordered in the name of the public administrator, and the substitution was shown by the court records *Held*, that the record taken together, sufficiently showed that the judgment was in favor of A. & B., in their administrative capacity, and that a sheriff's deed reciting such judgment, was not *quoad hoc* defective.—Acock v. Stuart, 150.

3. *Curator—Final settlement—Suit by sureties against public administrator.*—The final settlement of a curator with his ward is a lien on the real estate of the curator, to the extent of the indebtedness shown by the settlement; and the failure of a public administrator having the curator's estate in charge, to state the fact of such lien in his petition for the sale of the land, as required by statute, (Wagn. Stat., 95, § 11) would constitute a breach of his bond, but would not render him liable thereon to the sureties on the curator's bond for the sums they had been compelled to pay by reason of the default of the curator. The damages on such proceeding would be too remote and consequential.—State, to use, Lovell v. Todd, 217.

4. *Agent of deceased person may testify as to transactions subsequent to the death.*—A transaction had by the agent of a deceased person, since the death of his principal, may be shown in evidence, but in such case the agent himself must testify.—Leeper v. McGuire, et al., 360.

5. *Administrator—Admissions touching estate, when incompetent.*—An administrator may testify touching transactions regarding the estate of the deceased which occurred before the granting of his letters; but his admissions after he becomes administrator, affecting as they do the interests of the estate, cannot be proved.—Id.

6. *Administrator's estate—General and special statutes of limitation.*—In the absence of any notice of the grant of letters of administration, the general statute of limitation applies, and begins to run in favor of the estate from the date of the letters.

Where notice of the grant of letters has been given, the special statute of three years takes effect, and the failure of such notice does away with that special bar, but not with the general limitation law.—Ayers, admr. v. Donnell, exr., 396.

ADMISSIONS; See Administration, 5; Agency, 1; Evidence, 2, 4, 6.

AGENCY.

1. *Evidence—Corporations—Admissions by agent, bind when.*—Language used by the superintendent of a street railway company, admitting and justifying an assault of one of its drivers, was held to bind the company.–Malecek v. Tower Grove & L. R. R. Co., 17.

2. *Agent—Principal responsible for negligence of, when.*—The principle is well settled that where an agent is employed to perform or superintend work, the principal is responsible to third persons for injuries caused by the neglect or nonfeasance of the agent in doing his work. And this principle obtains, though the agent exceeds his powers or disobeys his instructions, provided he does the act in the course of his employment.—Harriman, et al. v. Stowe, 93.

3. *Agent, liability of, to third party for misfeasance.*—In a case of positive misfeasance, and not mere omission of duty, on the part of an agent or employee, he will be directly liable to a third party for injuries resulting therefrom. Thus where an agent undertook to build a trap-door, but did the work so negligently as to cause the injury complained of, action would lie by the injured party not only against the principal but the agent also.—Id.

4. *Corporation, agent of—Authority, how shown.*—It is a settled rule of law that not only the appointment, but the authority of the agent of a corporation may be implied from the adoption or recognition of his acts by the corporation.—Kiley v. Forsee, 390.

See Corporations, 3; Insurance, Fire, 1; Partnership, 6.

APPEAL; See Practice, civil—Appeal.

APPEARANCE; See Justices' Courts, 8; Practice, civil, 2; Practice, civil—Pleading, 6.

ARREST OF JUDGMENT; See Practice, civil, 3.

ASSIGNMENTS.

1. *Assignments, fraudulent—Knowledge as to fraud by assignee.*—A *bona fide* assignee for value will not be affected by the fraudulent intent of his assignor of which he has no knowledge. Knowledge of the mere fact of the assignor's indebtedness at the time of the transfer will not be sufficient to defeat it.—Durkee v. Chambers, 575.

ATTACHMENT.

1. *Attachment—Order of publication—Variance—What not material—When order may be published.*—The fact that the published order in an attachment suit purported to have been made by the order of the clerk instead of that of the court as stated in the original order, will not vitiate a sale of land under it in a collateral proceeding. And a publication ordered by the clerk in vacation after the lapse of two terms from the date of process, and without any new affidavit would be good. (Kane vs. McCown, 55 Mo., 181.)—Johnson v. Gage, 160.

2. *Attachment—Order of publication—Filing papers—Presumption as to.*—The issuance of an order of publication raises the presumption that the petition and other papers in the case had been filed theretofore, without any indorsement thereon of the date of filing.—Id.

3. *Attachment—Jurisdiction—Publication.*—Where in an attachment suit the required affidavit and bond have been filed, and an attachment regularly issued, and land seized and levied on by virtue of the attachment, the court thereby acquires jurisdiction of the case as to the property attached, and a judgment rendered in such cause against the property attached will not be void, although no sufficient publication has been made. (Freeman vs. Thompson, 53 Mo., 183; Holland vs. Adair, 55 Mo., 40.)—Id.

4. *Constable releasing attached property, liable on his bond, when—Measure of damages against constable, what.*—Where property is attached and judgment obtained before a justice, a constable who turns over the proceeds to a third party on mere notice of claim, without proof of title, becomes liable therefor on his bond. And the measure of damages will be the amount and value of the property wrongfully released. (See State to use, etc. v. Langdon, *ante* p. 350.) And where judgment is rendered, an inquiry of damages should be awarded to ascertain that fact.

ATTACHMENT, continued.

The proper course of the claimant in the original suit is to interplead while the attachment is pending, and not afterward.—State, to use v. Langdon, et al., 353.

See Garnishment; Sheriff, 2; Courts, 1.

B.

BAILMENT; See Innkeeper, 1.

BANKS AND BANKING; See Evidence, 8.

BILLS AND NOTES, continued.

1. *Prom. notes—Extension—Surety, when held.*—An extension of time for a definite period was granted to the principal maker of a note without the consent of the surety, and the contract for extension was indorsed on the back of the note. Surety held released.—Germ. Savings Association v. Helmrick, et al., 100.

2. *Promissory notes—Extension—Payment of interest in advance—Discharge of sureties.*—A promise of extension upon a note, in order to discharge a surety thereon, must be such as will prevent the holder from bringing an action against the principal; and the taking of interest in advance will not constitute such a promise.—Hosea v. Rowley, 357.

3. *Promissory note—Agreement for extension—Surety, how affected by, etc.*—An agreement between the principal and payee of a promissory note made at or after maturity, for an extension, in order to discharge a surety thereon, must be a valid and binding agreement which would deprive the payee of the power to sue until after the period of extension; but a mere indulgence, without any consideration passing, would have no such effect.—Hemery v. Marksberry, 399.

4. *Promissory notes—Suretyship—Agreement for usurious interest, etc.*—Generally, where the holder makes with the principal maker a binding contract which varies the terms of a note, without the consent of the surety, the holder knowing of the suretyship, the latter is discharged. But this rule does not cover the case of an agreement without any consideration for the payment of interest at more than ten per cent. where payment was made to depend simply on the personal honor of the maker of the paper.—Id.

5. *Usurious interest on notes—Contract void, how far—Schools—Construed statute.*—A contract for usurious interest on a note does not render the note void *in toto*, but only as to interest upon the amount actually loaned, the legal interest being recoverable for the use of the common schools. (Wagn. Stat. 783, § 5.)—Id.

6. *Evidence—Promissory note—Handwriting proved by comparison, etc.*—In suit on a note where defendant denies its execution under oath, his signature to the note may be proved by testimony of experts on comparison of that signature with his name as attached to the answer, the genuineness of the latter being first established.—Corby, Exr'x, &c., v. Weddle, 452.

7. *Practice, civil—Pleading—Evidence—Note—Denial of execution—Fraud may be shown.*—Under a plea denying the execution of a note, defendant may prove that his signature was procured by fraud.

Generally where an instrument is void *ab initio* and not merely voidable, the plea of *non est factum* is proper. And evidence which shows the paper to be void is admissible under that plea.—Id.

8. *Note—Signature obtained by fraud—Party not liable to innocent holder for value.*—Where one was induced to sign a note under false representations that the paper was a contract for the agency for certain hay forks, *Held*, that no action would lie against him on the note, even in the hands of an innocent holder, for value before maturity. (Martin vs. Smylee, 55 Mo., 377; Briggs vs. Ewart, 51 Mo., 245 affirmed.)—Id.

BANKS AND BANKING, continued.

9. *Partnership—Note given outgoing partner for assets—Suit on in action at law, when proper.*—Where one of two co-partners buys the notes and accounts of the firm at their face value and gives the co-partner his note for the amount with the understanding that where the notes and accounts prove worthless, a rebate *pro tanto* should be made on the purchase note, *held*, that in suit on the note in an action at law, defendant might, where these assets prove valueless, set up the facts to that extent as a defense to the note. No resort would be necessary in the first instance to a bill in equity for the purpose of settling the partnership. (See Russell vs. Grimes, 46 Mo., 410.)—Bethel v. Franklin, et al., 466.

10. *Promissory note—Extension—Discharge.*—An extension granted to the principal debtor in a promissory note in consideration of usurious interest paid in advance, will not operate a release of the surety.—F. & T. Bank v. Harrison, 503.

See Conveyances, 4; Corporations, 7.

BILL OF PARTICULARS; see Mechanic's Lien, 2.

BOND, ATTACHMENT; see Attachment, 4.

BOND, COUNTY, see County Bonds.

BOND, OFFICIAL; see Constable, 2.

BOUNDARIES; see Land and Land Titles, 5.

BURDEN OF PROOF; see Conveyances, 2; Judgment, 1; Subscription, 2.

C.

CLERK, COUNTY; see County Court, 1.

CONDEMNATION OF LAND.

1. *Damages—Condemnation of land.*—Where a statute authorizing the condemnation of land requires the commissioners to "assess the damages which the owner of the land may sustain by reason of such appropriation," the assessment is not confined to the land actually taken. There may be consequential damages which result by reason of the appropriation, which are fairly comprehended within the scope of the law.—Han. Bridge Co. v. Schaubacher, 582.

2. *Condemnation of land—Damages — Consequential — Measure of.* — When nothing but compensatory damages are allowed, the recovery must be confined to the actual damages sustained; and where the damages consisted in depriving the owner of the use of other lands on which were erections and improvements necessary for the use of the lands remaining, which erections and improvements could be moved to said remaining land, and be then as valuable and useful as before, the measure of damages would be the expense of such removal, and the value of the time lost while it was being effected.—Id.

3. *Condemnation of land—Personal examination.*—In a proceeding for condemnation of right of way for a railroad, upon exceptions to the commissioners' report, it not appearing from the record, whether the fact of a personal examination of the land by the commissioners was in issue, the Supreme Court cannot say there was error in the rejection of proofs that the commissioners went upon the ground and viewed it.—Quincy, Mo. & Pac. R. R. v. Ridge, et al., 599.

4. *Condemnation of land—Evidence—Presumption.*—There is no error in the exclusion of testimony for the purpose of sustaining the commissioners' report, to the effect that they were instructed in their duties by the adverse attorneys. The matters of inquiry for the court are; what did the commissioners do in fact, and upon what principles did they arrive at the conclusions reported? Nothing appearing in the record to show how this inquiry was conducted, the action of the court below, in setting aside the report, will be presumed correct. —Id.

CONDEMNATION OF LAND, continued.

5. *Condemnation of land—Reference—Jury.*—Under the act approved March 8, 1873, when the report of commissioners is set aside, the court is authorized to refer the matter to a jury.—Id.

6. *Condemnation of land—Damages.*—In estimating the damages in condemnation for right of way, the jury are to consider the quantity and value of the land taken and the damage done to the whole tract; and from these amounts to deduct the benefits, if any, peculiarly accruing to that tract of land, and not shared by it in common with other lands in the neighborhood.—Id.

7. *Condemnation of land—Damages.*—In condemnation for right of way, the actual value of the land taken is not the measure of damages.—Id.

See Eminent Domain.

CONSIDERATION.

See Land and Land Titles, 8, 19; Railroads, 7, 8, 9, 12, 14, 15.

CONSTABLE.

1. *Constable releasing attached property liable on his bond, when—Measure of damages against constable, what.*—Where property is attached and judgment obtained before a justice, a constable who turns over the proceeds to a third party on mere notice of claim, without proof of title, becomes liable therefor on his bond. And the measure of damages will be the amount and value of the property wrongfully released. (See State to use, etc. v. Langdon, *ante* p. 350.) And where judgmet is rendered, an inquiry of damages should be awarded to ascertain that fact.

The proper course of the claimant in the original suit is to be interpleud while the attachment is pending, and not afterward.—State to use v. Langdon, et al., 353.

2. *Constable's bond—Suit on for failure to make proper return—Criterion of damages.*—In action on a constable's bond, for failure to return an execution according to its command, under a proper construction of the statute, (Wagn. Stat., 844-5, §§ 19, 20, 23) plaintiff's measure of damages is not necessarily the amount of the execution with one hundred per centum per annum. The production of the execution may be *prima facie* but not conclusive evidence on this point. But the constable may, notwithstanding, show what amount could in point of fact have been realized on the execution. And the amount of damages actually sustained by plaintiff, with one hundred per cent. is the true measure of damages.—State, ex rel., v. Langdon, 350.

See Execution, 1.

CONTRACTS.

1. *Contracts—Adjoining proprietors—Payment for strip of land and fence—Presumption as to agreements for.*—Where one adjoining proprietor pays another for the use of a strip of land and division fence up to a specified time, and continues to use them afterwards, the law will, without any express agreement to that effect, presume a promise to pay for such further use, at least what they are reasonably worth.—Grigsby v. Fullerton, 309.

2. *Usurious interest on note—Contract void, how far—Schools—Construed Statute.*—A contract for usurious interest on a note does not render the note void *in toto*, but only as to interest on the amount actually loaned, the legal interest being recoverable for the use of the common schools.—(Wagn. Stat., 783, § 5.)—Hennery v. Marksberry, 399.

See Bills and Notes; Conveyances; Corporations, 3, 6, 7, 8; Fraud, 5; Frauds, Statute of; Insurance, Fire; Insurance, Life; Mortgages and Deeds of Trust; Partnership; Railroads, 10; Sales; Sheriff's Sales; Subscription; Sureties.

CONVEYANCE.

1. *Conveyances, voluntary—Made by persons in embarrassed circumstances—Fraudulent in law, when.*—In order to invalidate a voluntary conveyance, it is not necessary that there should be an actual intent to hinder and delay creditors. It is sufficient to show in such case, that the grantor was in embarrassed or doubtful circumstances, and was not possessed of ample means, outside of

CONVEYANCE, continued.

the property conveyed, for the satisfaction of his then existing debts. Such conveyance, under such state of facts, is fraudulent in law as to creditors, at the time of its execution.—Patten v. Casey, et al., 118.

2. *Deed absolute on its face intended as a mortgage—Nature and amount of proof required.*—Although a deed may be absolute on its face, yet if it be shown that it was given merely as a security for debt, courts of equity will decree it to be a mortgage with the right of redemption. And no agreement of the parties can take away that right. But the burden of proof is upon the party who alleges that such a deed is a mortgage, and the proof must be clear and convincing, leaving no room for reasonable doubt as to that fact.—Worley v. Dryden, 226.

3. *Tax deed—Failure of deed to recite manner of notice, effect of.*—A tax deed which merely recites that "due notice" was given of the sale, without reciting the manner of the notice, is absolutely void and will pass no title.—Smith v. Funk, 239.

4. *Deed, quit-claim—Purchase money—Note for, procured by fraud—Defenses.*—Where one is induced, by fraudulent representations, to accept a quit-claim deed of certain land, such fraud will constitute a good defense to a suit on a promissory note given for the purchase money.—Id.

5. *Sheriff's deed—Cannot be attacked collaterally, when.*—In ejectment for land bought at sheriff's sale, mere irregularities which do not render the deed absolutely void, cannot be inquired into.—Hewitt v. Weatherby, 276.

6. *Dower—Seizin of husband.*—Where the seizin of the husband is for a transitory instant only, as where the same act which gives him the estate also conveys it out of him, or where he is the mere conduit employed to pass the title to a third person, no right of dower attaches; and this principle also applies where the conveyance is effected by two deeds, provided they are delivered at the same time, because they take effect from delivery only.—Fontaine v. Boatmens' Savings Inst., 552.

7. *Conveyances—Execution—Acknowledgment—Delivery—Presumption.*—A deed is not generally executed until it is acknowledged, and till that takes place there is no presumption of delivery.—Id.

See Evidence, 9; Husband and Wife, 1, 2, 4; Land and Land Titles; Sheriff's Sales; Wills, 1.

CONVEYANCES, FRAUDULENT; See Conveyances, 1; Fraud.

CORPORATIONS.

1. *Evidence—Corporations—Admissions by agent bind when.*—Language used by the superintendent of a street railway company, admitting and justifying an assault of one of its drivers, was held to bind the company.—Malecek v. Tower Grove, & L. R. W. Co., 17.

2. *Corporations—Exemplary damages.*—It is the well settled law of this State, that corporations, like natural persons, are liable in exemplary damages when the facts of the case are of a character to warrant them.—Id.

3. *Corporation—Officer of, exceeding his powers, company bound, when.*—It is well settled that where a person deals with an officer of a corporation who assumes authority to act in the premises, and no irregularity or want of authority is brought to the knowledge of the party so dealing, and nothing occurs to excite suspicion of such defect, the corporation is bound, although the agent exceeded his powers.—Lungstrass v. Germ. Ins. Co., 107.

4. *Corporations—Capital stock, increase of—Meeting of stockholders—Certificate, defects in—Subsequent subscription.*—Where a meeting of stockholders, touching increase of capital stock, is held pursuant to the statute, (Wagn. Stat., 335–6, § 12,) but the certificate of the proceedings fails to state "the amount of capital stock paid in" and "the whole amount of the debt and liabilities of the company," such defects will not defeat a recovery for the amount of his subscription against a stockholder, where it appears, that his shares were subscribed subsequent to the date of the certificate, and the facts are sufficient

CORPORATIONS, continued.

to raise the presumption that defendant subscribed, with a knowledge of the defects and waived the same. But the mere subscription without any payment thereon, or any other act of recognition, will not bind the defendant.—Kans. City Hotel Co. v. Hunt, 126.

5. *Corporations—Cessation of business—Right to sue.*—The cessation of active business on the part of a corporation, does not imply a dissolution of the company, so as to deprive it of the right to bring suit.—State Nat. Bank v. Robidoux, 446.

6. *Corporations, acts of, void in part or in whole, rule touching.*—If a corporation does an act not within the authorized objects of its charter, or performs an authorized act by a prohibited method, the acts will be wholly void. But if the departure or violation apply only to the measure of extent or quantity in an authorized procedure, then the act will be valid up to the prescribed limit, and void only as to the excess.—F. & T. Bank v. Harrison, 503.

7. *Corporations, loans by—Usurious interest.*—The statute authorizing the formation of banking corporations with power to loan money "at a rate of interest not to exceed ten per cent. per annum," does not render void a note taken for a loan at a greater rate of interest.—Id.

8. *Corporations, usurious contract with, governed by the general law.*—Usurious contracts made with corporations are governed by the general law relating to interest and usury; and suits upon them must be disposed of in like manner as in cases of such contracts between private persons.—Id.

See Corporations, Municipal; Insurance, Life; Insurance, Fire; Powers, 1, 2; Railroads; Sales 1.

CORPORATION, MUNICIPAL.

1. *Damages—Municipalities—Failure to repair streets—Measure of liability.*—City authorities are bound to keep in repair only such streets and parts of streets as are necessary for the convenience and use of the traveling public, and where at the point of accident the street was abundantly wide and well repaired to enable persons, with the exercise of ordinary care, to avoid the injury, the city will not be responsible merely from the existence of a defect in the untraveled portion of the street.—Brown v. Mayor, &c. of Glasgow, 156.

2. *Corporations, municipal—Street improvements—Ordinance, what necessary to empower engineer.*—The charter of the city of St. Joseph provided that whenever the City Council should order macadamizing, guttering, etc., and they should "deem the performance of the work by contract, to be advantageous," it should be the duty of the city engineer to advertise for proposals; *Held*, that a subsequent ordinance requiring the engineer to so advertise was equivalent to an averment by the council, that such work under contract was advantageous without any further ordinance in terms directing the work to be so done. (Young vs. City of St. Louis, 47 Mo., 492.)—Kiley v. Forsee, 390.

3. *Corporation, municipal—Deputy engineer, appointment of—Filing of certificate with register, etc.*—Where a city charter authorized the city engineer to appoint a deputy, but provided that the appointment should be in writing and filed with the register, and the proof showed that the deputy was appointed and acted and was recognized as such, the omission to file the certificate would not vitiate his acts.—Id.

4. *Corporation, agent of—Authority, how shown.*—It is a settled rule of law that not only the appointment, but the authority of the agent of a corporation may be implied from the adoption or recognition of his acts by the corporation.—Id.

COSTS.

1. *Judgment for costs not final.*—A judgment for costs is not a final judgment from which an appeal will lie. (Boggess v. Cox, 48 Mo., 278.)—Dale, v. Wright, 110.

See Justices' Courts, 2.

COUNTY BONDS.

1. *County bonds—Phelps county—Issue of for school of mines, etc.—State Constitution—Injunction, etc.*—The issue of bonds by Phelps county, under the act of January 24th, 1870, (Adj. Sess. Acts, 1870) in aid of the school of mines and metallurgy, at Rolla, was a lending of the credit of the county to a corporation, within the meaning of § 14, Art XI of the State Constitution, and a law authorizing the issue of said bonds without the sanction of two-thirds of the voters of the county was void. That section was not intended to be limited to private corporations, but applies also to those of a public nature.

Where a county orders the issue of such bonds without the popular vote, injunction is the proper remedy.—State v. Curators State University, 178.

COUNTY COURT.

1. *County Court—Settlement of accounts of delinquent clerk—Notice, etc.*—The County Court cannot proceed under the statute (Wagn. Stat., 412, §§ 19, 20, *et seq.*) to settle the accounts of a delinquent clerk, after expiration of his term of office, in a summary manner without notice; the statute applies only to persons in office.—Ray Co. v. Barr, 290.

2. *Notice of proceedings where law is silent.*—Where the law is silent as respects notice to a person whose interests are affected by a proceeding in court, notice is always implied, and he must be brought into court in some appropriate way before he will be bound.—Id.

COURTS.

1. *Courts, co-ordinate—Conflict of authority as to custody of property under attachment or execution.*—In case of a conflict of two co-ordinate courts, as to the jurisdiction over property, it is the universal rule that the tribunal in which jurisdiction first attaches by the seizure and custody thereof, under its process, must prevail.—Metzner v. Graham, 404.

COURT, CALDWELL COMMON PLEAS; see Practice-Supreme Court, 2.

COURTS, COUNTY; see County Court; Railroads, 1.

COURT, PROBATE; see Administration; Wills.

CRIMES AND PUNISHMENTS; see Criminal Law; Perjury; Practice, Criminal; Revenue, 3; Usury.

CRIMINAL LAW.

1. *Criminal law—Murder, indictments for—Malice may be inferred.*—In indictments for murder, proof of willfulness and deliberation need not be express or positive, but may be deduced from all the facts attending the killing; and if the jury can reasonably and satisfactorily infer from all the evidence, the existence of the intention to kill and the malice of heart, it will be sufficient. But if malice and premeditation are not proved, the law presumes the killing to be murder in the second degree.—State v. Underwood, 40.

2 *Criminal law—Self defense.*—A person who seeks and brings on a difficulty cannot avail himself of the right of self defense in order to shield himself from the consequences of killing his adversary, however imminent the danger in which he may have found himself in the progress of the affray.—Id.

3. *Criminal law—Mutual combat—Murder.*—Where persons by mutual understanding engage in a conflict and death ensues to either, the slayer will be guilty of murder.—Id.

4. *Criminal law—Indictment for forging judge's certificate—Allegations as to county wherein crime occurred, etc.*—An indictment for forging a judge's certificate to a fee bill (Wagn. Stat., 490, § 15,) is not bad by reason of the fact that it charges that the prisoner forged the certificate, and also, that he "caused and procured the same to be forged." The latter clause might be stricken out as surplusage. And under our liberal system of pleading, an averment in the indictment that the forged instrument purported to be the certificate of "A. B., judge of the ninth judicial circuit," is sufficient without the further affirmative allegation, that A. B. was judge of that circuit. But the failure of such indictment to set forth in what county or circuit the cause wherein the fee bill issued was tried, or in what county or circuit the costs or fee accrued, would render the complaint as fatally defective.—State v. Maupin, 205.

D.

DAMAGES.

1. *Corporations—Exemplary damages.*—It is the well settled law of this State, that corporations, like natural persons, are liable in exemplary damages when the facts of the case are of a character to warrant them.—Malecek v. Tower Grove & L. R. Co., 17.

2. *Railroads—Action for damages in name of owner—Constr. Stat.*—Suit against a railroad company, to recover double damages for injuries to stock, need not be brought in the name of the State, under § 42 of the Railroad Act, (Wagn. Stat., 310) but may be instituted in the name of the owner, under § 43 (p. 310-11).—Sparr v. St. L., K. C. & N. R. R. Co., 152.

3. *Damages—Municipalities—Failure to repair streets—Measure of liability.*—City authorities are bound to keep in repair only such streets and parts of streets as are necessary for the convenience and use of the traveling public; and where at the point of accident the street was abundantly wide and well repaired to enable persons, with the exercise of ordinary care, to avoid the injury, the city will not be responsible merely from the existence of a defect in the untraveled portion of the street.—Brown v. Mayor, Councilmen and Citizens of Glasgow, 156.

See Attachment, 4; Condemnation of Land; Constable, 2; Eminent Domain; Evidence, 3; Justices' Courts, 5; Railroads, 12, 15; Trover, 1.

DEATH OF PARTY; See Practice, civil—Actions, 1.

DEED; See Conveyance; Land and Land Titles; Mortgages and Deeds of Trust.

DEED OF TRUST; See Mortgages and Deeds of Trust.

DEDICATION TO PUBLIC USE; See Condemnation of Land; Land and Land Titles.

DEPOSITIONS; See Evidence, 5; Practice, civil, Pleading, 11.

DEMURRER, see Practice, Civil, Pleading 10.

DESCENT AND DISTRIBUTIONS; See Homestead, 2.

DESCRIPTION; See Land and Land Titles; Wills.

DIVORCE.

1. *Divorce obtained in Indiana on order of publication—Effect of as to wife's claim of dower.*—A decree of divorce regularly obtained by a husband in Indiana, on an order of publication, without personal service, operates as a divorce in his favor in this State, so as to prevent his wife from claiming her dower in lands owned by him here. The decree when so pronounced is a judgment *in rem* and when not affected by fraud is valid everywhere; but when rendered on an order of publication can have no effect *in personam* extra-territorially.—Gould, et al. v. Crow, 200.

2. *Divorce for wife's fault—Statute touching—Dower rights.*—The statute of Missouri, barring the wife's claim for dower after divorce granted by reason of her fault, (Wagn. Stat., 541, § 14) applies to all divorces, whether obtained in this or any other State, and whether obtained on personal service or by order of publication.—Id.

DOWER.

1. *Dower—Alienation of property by husband—Effect of.*—The alienation of eal estate by the husband, whether voluntary as by deed or will, or involuntary, as by proceedings against him or otherwise, will confer no title on the lienee, as against the wife in respect to her dower.—Grady v. McCorkle, et l., 172.

2. *Dower—Suit for specific performance estops claim for, when.*—In a suit for specific performance of a contract to convey land, brought against the widow and heirs of the owner, where the dower of the widow is not in any manner determined or litigated, or drawn in question by the proceedings, a decree for plaintiff will not estop the widow from afterward recovering her dower.—Id.

DOWER, continued.

3. *Dower—Seizin of husband.*—Where the seizin of the husband is for a transitory instant only, as where the same act which gives him the estate also conveys it out of him, or where he is the mere conduit employed to pass the title to a third person, no right of dower attaches; and this principle also applies where the conveyance is effected by two deeds, provided they are delivered at the same time, because they take effect from delivery only.—Fontaine v. Boatmens' Savings Inst., 552.

See Divorce, 1, 2.

DRAINAGE; See Railroads, 11, 12.

E.

EJECTMENT.

1. *Practice civil—Ejectment—Special verdict.*—A suit in ejectment for a certain tract of land without claim for further relief is not one wherein special issues of fact may be submitted to the jury. (Wagn. Stat., 1040-1, §§ 11, 12, 13; 1042, §§ 20, 22.)—Major's Heirs v. Rice, 384.

2. *Ejectment—Labeaume survey and patent of 1852 prevailed over Lirette confirmation and survey of 1826—Brazeau reservation—Magwire vs. Tyler, referred to.*—In ejectment for certain land in St. Louis, plaintiff's claim was based originally on a confirmation made in 1810 to Labeaume, "according to the Soulard survey in 1799." The first survey of the tract did not include the land in dispute. But it was set aside and a new survey made retracing the Soulard survey, which embraced that tract, and on this new survey, a patent was issued to Labeaume in 1852. Defendant claimed, by virtue of a confirmation to Lirette of "one by forty arpents" made in 1816 by act of Congress, under which the land in controversy was located by a United States survey in 1826. *Held*, that the Labeaume confirmation being of a definite tract of land, took immediate effect, and that the subsequent proceedings by survey and patent related back to the proceedings before the board in 1810 and prevailed against the confirmation to Lirette. The case of Magwire vs. Tyler originated in a dispute about locality, and in that case the titles of Brazeau & Labeaume were synchronous, and originated before the same board, and the survey locating the Brazeau tract within the Labeaume confirmation, was in that case held correct, but that decision did not determine the last Labeaume survey and patent issued thereon, in 1852, to be invalid, except as to the Brazeau reservation.—Tyler v. Wells, 472.

3. *Ejectment—Sheriff's Deed—Land and land titles.*—In ejectment the defendant's introduction of a sheriff's deed of the plaintiff's title, is an admission that the plaintiff owned the property at the date of the execution sale.—Rumfelt v. O'Brien, 569.

4. *Ejectment—Title—Judgment—Possession.*— The purpose of the action of ejectment is to try title, and it is not error for the judgment to declare ownership in the plaintiff, when the petition demands only possession of the premises.—Clarkson v. Stanchfield, 573.

5. *Ejectment—Possession—Disclaimer—Judgment.*—A "disclaimer" of possession by defendant in ejectment, is nothing more than a denial of one of the facts necessary to sustain the plaintiff's action. The finding for the plaintiff on the issues is conclusive against the defendant as to possession, and entitles the plaintiff to judgment.—Id.

6. *Ejectment—Verdict in—Possession of defendant—Finding as to.*—Under the statute relating to ejectment, (Wagn. Stat., 559, § 8.) the verdict of a jury that the right of property and right of possession is in plaintiff, is sufficient where defendants possession at the time of commencing suit is denied in his answer.—Caldwell v. Stephens, et al., 589.

See Railroads, 1, 8, 9; Streets, 1.

EMINENT DOMAIN.

1. *Eminent domain—Condemnation of private property—Compensation—Railroads—Pre-payment as a condition precedent to surrender of land by owner—Acquiescence by owner in expenditures—Estoppel—Ejectment, etc.*—Private property cannot be taken even in the exercise of eminent domain, without compensation to the owner; and before the title can be absolutely vested by virtue of proceedings for condemnation, payment becomes indispensably necessary. But where a railroad company commences proceedings under the statute for condemnation of private property, and the commissioners award a given sum as damages, and the court decrees, that on payment thereof, title shall vest in the company, and the owner files his objections to the award and procures a higher assessment, but does not insist on pre-payment as a condition precedent to a surrender of the land, nor attempt to obstruct or in any way impede the progress of the work, and by such acquiescence, induces the company to expend large sums upon the road, he cannot maintain ejectment against the company simply on the ground of such failure of pre-payment. In the case supposed, of course the strict title will not pass to the company till the paying of the damages awarded.

The owner will, however, have other and sufficient remedies, *e. g.*, a court of equity would unquestionably interfere, if necessary, and place the road in the hands of a receiver until the damages are paid from the earnings of the road.—Provolt v. Chicago, R. I. & Pac. R. R. Co., 256.

See Condemnantion of Land; Streets, 1.

EQUITY.

1. *Equity—Resulting trusts as to land—Parol statements—Evidence touching.*—In suit against the heirs of a deceased person to establish a resulting trust as to land, in plaintiff's favor, on the basis of parol admissions, the evidence to warrant a recovery must be so emphatic and unequivocal as to banish every reasonable doubt from the mind of the chancellor respecting the existence of the trust. Evidence as to such statements unless strongly corroborated will be insufficient.—Kennedy v. Kennedy, 73.

2. *Equity—Special verdict—Chancellor not bound by.*—The chancellor is not bound by the verdict of a jury on special issues submitted to them. | Durkee v. Chambers, 575.

3. *Equity—Decree—Reversal of action of Supreme Court—What proper.*—Where the order or decree of a chancellor is reversed on appeal, the Supreme Court ought to render such decree as may be right upon a review of the whole record.—Id.

See Eminent Domain, 1; Fraud; Homestead, 3; Husband and Wife, 2; Land and Land Titles, 8, 9; Landlord and Tenant, 3; Partnership; Practice, civil, Trials, 11; Trusts and Trustees.

ESTOPPEL; See Eminent Domain, 1; Land and Land Titles, 11; Railroads, 6, 7; Sales, 1.

EVIDENCE.

1. *Evidence—Corporations—Admissions by agent, bind when*—Language used by the superintendent of a street railway company, admitting and justifying an assault by one of its drivers, was held to bind the company.—Malecek v. Tower Grove & L. R. W. Co. 17.

2. *Witnesses—Testimony of wife when substantially a party — Constr. stat.*—Section 5 of the Witness Act (Wagn. Stat., 1372-3,) does not preclude the wife from testifying where she is a substantial party to the suit.—Harriman, v. Stowe, 93.

3. *Suit for damages—Subsequent declarations, when res gestæ.*—In suit to recover for injuries, where the casualties and declarations touching the same formed connecting circumstances, although some little time may have intervened between them, the declarations are admissible as part of the *res gestæ*.–Id.

EVIDENCE, continued.

4. *Evidence—Confession made while in charge of an officer—When admissible.*—The mere fact that a prisoner is in charge of an officer at the time a statemen- or confession is made, is not sufficient to render the same inadmissible in evi dence. It must further appear that it was induced by hope, on the one hand, or by fear or intimidation on the other.— State v. Carlisle, 102.

5. *Evidence—Deposition—Signature of witness—What sufficient.*—Where, from any cause, a deponent is unable to sign his own name, his signature written by another, at his request, is, in effect, a signing by himself, and is a sufficient compliance with the statute. (Wagn. Stat., 1078, § 25.)—Id.

6. *Evidence—Admissions—Other statements must be taken in connection with.*—To entitle admissions to be received in evidence, they must be taken together with all that was said at the same time and place, whether the remainder be against or for the person making them. But it is for the jury to attach what credit they see proper to the different statements, or parts of statements, both *pro* and *con*.—Id.

7. *Evidence—Contents of lost record—Nature of action to prove.*—The general rule is, that if a record is lost or destroyed, its contents may be proved like those of any other instrument. And the party may proceed by his common law action without resorting to the statutory remedy.—Parry v. Walser, Adm'r, 169.

8. *Evidence—Volume of laws—Certificate of Secretary of State, etc.*—The certificate of the Secretary of State of Virginia, attesting a certain volume of the laws of that commonwealth, stated the title of the book to be "The Code of Virginia," etc., "published pursuant to law." * * Certificate held to show sufficiently that the volume was published by the authority of the State of Virginia.—State to use v. Williamson, 192.

9. *Evidence—Banks, accounts of, how proved—Testimony of clerks and book-keepers, etc.*—Where the testimony of the clerks and book-keepers of a bank showed that the books were accurately kept, and that by the universal custom in the bank, entries were made and the books written up each day, from the checks of the customer or the tickets of the teller, and that the books were then balanced to verify their accuracy, *held*, that the books may be used in evidence to prove the accounts of the bank with its depositors.—Smith v. Beattie, 281.

10. *Evidence—Loss of deed, proof of as to—Secondary evidence, etc.*—Where a deed was attached to certain depositions, and the package duly enveloped sealed, directed and stamped, and placed in the mail, but failed to reach its destination, and was never heard of afterwards: *Held*, that the loss was sufficiently established to let in secondary evidence touching the contents of the deed.—Shaw v. Pershing, 416.

11. *Witness—What no ground for refusal to testify.*—It is no ground for a witness' refusal to testify, that his testimony is sought for the purpose of making a civil case against him. Every man's knowledge of facts which may be material to the administration of justice is, subject to certain exceptions of personal privilege, the property of the law. *Ex Parte*, James E. Munford, 603.

12. *Witness—Notary Public may enforce attendance of.*—If a suit be pending, a notary public may enforce the attendance of witnesses to give their depositions, and may compel them by imprisonment to answer any questions not violative of personal privilege. But the officer cannot exercise such powers if no suit be pending; and this fact may be inquired into in a proceeding upon *habeas corpus*. *Id.*

See Administration, 5; Bills and Notes, 6, 7; Ejectment, 3; Equity, 1; Land and Land Titles, 1, 2, 12, 13, 14; Lease, 1; Mechanic's Lien, 4, 5; Perjury, 1; Practice, civil, Pleading, 8; Practice civil, Trials, 8, 10, 14; Practice, Supreme Court, 1, 4; Sheriff's Sales, 1; Venue, 4; Wills, 2; Witnesses.

EXECUTION.

1. *Execution—Exemption—Constable— Garnishment.*—The exemption right of a debtor in execution must be protected by the constable, whether they apply to property seized or to debts garnished.—State to use v. Barada, 562.

2. *Execution—Garnishment—Claim by debtor—Return.*—The officer holding an execution is bound by law to apprise the debtor of his rights, and the powers conferred upon him are ample to protect them in every possible case. If there be a garnishment upon which the debtor makes his selection and claim, the officer must show the facts in his return upon the execution, with the debt or amount reserved and set over to the defendant.—Id.

See Constable, 2; Garnishment; Justices' Courts, 1; Sheriff, 1, 2.

EXEMPTION; see Execution, 1, 2; Homestead; Justices' Courts, 7.

F.

FENCE.

1. *Division fences—Removal of—Constr. Stat.*—A division fence, within the meaning of the act of 1869 (Wagn. Stat., 633), is one erected on the boundary line between adjoining proprietors; and not one erected by one of them on his own land although near and parallel to the boundary line; and a fence of the latter description may be removed by the owner, after giving six months notice. (Wagn. Stat., 707, § 87.)—Jeffries v. Burgen, 327.

2. *Partition fences—Adjoining proprietors—Right of contribution.*—Under our statute, (Wagn. Stat., 633, § 1) where the owner of land puts up a sufficient fence on his line, and the adjoining proprietor afterwards uses it as a part of his own inclosure, the builder of the fence is entitled to recover from the adjoining proprietor half of the value of the fence; and if the builder sells his land before he has recovered such contribution, the right of recovery passes to his grantee.—Brawner v. Langton, 516.

See Railroads, 2, 5, 13.

FOREIGN JUDGMENT, see Judgment, 2, 6; Justices' Court, 4.

FORGING; see Criminal Law, 4.

FRAUD.

1. *Practice, civil—Fraud in fact—Question for the jury.*—Upon mere questions of fraud in fact, the Supreme Court will be reluctant to interfere with the verdict of a jury.—Wilson, et al., v. Maxwell, 146.

2. *Injunction—Fraud, unfair advantage gained by, in law court—Equity will interfere.*—Nothing is better settled than that, where by mistake or fraud, a party has gained an unfair advantage in proceedings in a Court of law, which must operate to make the Court an instrument of injustice, as where default was taken after other arrangements had been made between counsel for the disposition of the case, courts of equity will interfere and restrain him from reaping the fruits of the advantage thus gained.—Bresnehan v. Price, assignee, 422.

3. *Note—Signature obtained by fraud—Party not liable to innocent holder for value.*—Where one was induced to sign a note under false representations that the paper was a contract for the agency for certain hay forks, *Held*, that no action would lie against him on the note, even in the hands of an innocent holder, for value before maturity. (Maitin v. Smylee, 55 Mo,, 377; Briggs v. Ewart, 51 Mo., 245 affirmed.)—Corby, Exr. v. Weddle, 452.

4. *Fraud—Misrepresentations—Ignorance of facts.*—It is not material whether or not the person making false representations upon which another acts to his own disadvantage knows them to be false; the assertion to the injury of another, of something not known to be true, is equally reprehensible, in law as in morals, with the assertion of that known to be false.—Pomeroy v. Benton, 531.

FRAUD, continued.

5. *Equity—Fraud—Contracts, construction of.*—A Court of Equity looks not so much at the legal formalities with which a transaction is clothed as to its very pith and substance; and where a contract is in form broad enough to cover many things not in terms expressed upon its face, but it is manifest that the minds of the parties never met and concurred in reference to these matters, and where fraud has been practiced, equity will disregard mere technical forms and only attach to the contract the effect which both parties had in view at the time of its execution and delivery.—Id.

6. *Assignment, fraudulent—Knowledge as to fraud by assignee.*—A *bona fide* assignee for value will not be affected by the fraudulent intent of his assignor, of which he has no knowledge. Knowledge of the mere fact of the assignor's indebtedness at the time of the transfer will be not sufficient to defeat it.—Durkee v. Chambers, 575.

See Bills and Notes, 7; Conveyances, 1, 4; Conveyances, Fraudulent; Frauds, Statute of; Fraudulent Misrepresentations; Judgment, 1, 6; Sales, 1, 2.

FRAUDS, STATUTE OF.

1. *Statute of frauds—Parol contract for rescission of sale of lands.*—A parol contract for the purchase of lands is within the express provisions of the statute of frauds; and where there are no facts connected with the purchase which create any resulting trust or equitable right of redemption, a proceeding in equity will not lie for its rescission.—Culligan v. Wingerter, 241.

See Mortgages and Deeds of Trust, 8.

FRAUDULENT MISREPRESENTATIONS.

1. *Fraudulent misrepresentations—Negligence of vendee—Plea of—Parties must be on equal footing.*—Generally, where the courts have refused to uphold the defense of fraudulent misrepresentations of the vendor, basing the refusal on negligence of the vendee in ascertaining the facts, the case referred to sales of land, and both parties had equal opportunities of information. When vendor and vendee do not occupy an equal footing in this respect, the plea of negligence will not avail.—Wannell v. Kem, 478.

G.

GARNISHMENT.

1. *Garnishment—Wages—Appraisement.*—Debts and wages garnished by a constable and claimed by the debtor in execution to be exempted, are not required to be appraised in the manner provided for property levied upon.—State to use v. Barada, 562.

See Executions, 1, 2.

GIFT.

1. *Gift by parol—What words necessary to constitute.*—To constitute a parol gift, there must be a giving or actual transfer by words, and not mere words that would signify an intent to transfer in the future.—Spencer v. Vance, 427.

GUARDIAN AND WARD.

1. *Curator—Final settlement—Suit by sureties against public administrator.*—The final settlement of a curator with his ward is a lien on the real estate of the curator, to the extent of the indebtedness shown by the settlement; and the failure of a public administrator having the curator's estate in charge, to state the fact of such lien in his petition for the sale of the land, as required by statute, Wagn. Stat. 95, § 11) would constitute a breach of his bond, but would not render him liable thereon to the sureties on the curator's bond for the sums they had been compelled to pay by reason of the default of the curator. The damages on such proceeding would be too remote and consequential.—State to use of Lovell v. Todd, 217.

See Judgment, 3.

H.

HOMESTEAD.

1. *Homestead bought after indebtedess accrued, with proceeds of former homestead.*—Under a proper construction of the Homestead Act, (Wagn. Stat., 698, §§ 7, 8, 9,) a homestead purchased with the housekeeper's means is not exempt from being taken for a debt contracted before its purchase and the filing of the deed for it, unless such homestead is acquired by a sale of a previous one. It is immaterial whether the homestead was acquired directly or indirectly from the former homestead; but it must be procured with the proceeds derived from the sale of the homestead proper and not other land owned in connection with the homestead tract.—Farra et al. v. Quigly, 284.

2. *Homestead—Estate of widow a fee simple—Law as to inheritance of—Statute of sister States—Construction of.*—It is a well settled practice to construe foreign laws as the courts of the country where they originated have construed them; and where such laws, whether of a foreign country or of a sister State, are adopted here and made a part of our code, the presumption is that they are adopted with the construction already given by the foreign courts or sister State, where they had their origin. Hence, as the homestead law is a literal copy of a Vermont statute and the 5th section (Wagn. Stat., 698,) has been construed by the Supreme Court of Vermont, *Held*, in accordance with such Vermont decision, that under said section 1, where the husband dies, seized of a fee in the homestead, the wife has not merely a life estate, but a fee simple absolute therein, and on her death it goes to her heirs several or collateral, to the exclusion of the husband's heirs.

The court inclined to the opinion that where there were minor children of the husband by a former marriage, and the widow died before their majority, the title would go to them until they came of age, and then to the heirs of the deceased husband.—Skouten v. Wood, 380.

3. *Homestead—Equity—Cloud on title.*—A bill in equity will lie to secure relief from a cloud cast on title to real estate, by a sale under execution of property exempt under the homestead law. And such jurisdiction in equity is not ousted by the fact that a legal remedy is afterwards afforded, unless abolished by some prohibitory legislative enactment.—Harrington v. Utterback, et al. 519.

HUSBAND AND WIFE.

1. *Married woman—Power to convey where husband lives abroad.*—Where the husband is an alien, always residing beyond the realm, the wife may convey her estate in the same manner as a *feme sole*.—Galagher v. Delargy, 29.

2. *Married woman—Deed of—Liability on covenant—Subsequent promise.*—Where a husband and wife convey the estate of the latter, under the statute of Missouri, (Wagn. Stat., p. 273, § 2) she cannot be held in an action on her covenant, therein contained, against incumbrances. And a subsequent promise to pay the indebtedness guaranteed by said covenant, is void for want of consideration.—State Nat. Bank of St. Joseph v. Robidoux, 446.

3. *Married woman—Separate estate—Payment of taxes on—Claim for in equity—Assignment of.*—Payment of taxes on the separate estate of a married woman, at her instance, and perhaps even with her assent, will constitute a claim in equity against her estate, and such a claim may be assigned.—Id.

4. *Married woman—Conveyance of—Notary's certificate—Statutory requirements touching explanation and examination, etc., imperative.*—In suit upon a mortgage given by a married woman upon her real estate, the certificate to her acknowledgment is not conclusive; and where she testifies that she was not by the notary made acquainted with the contents of the deed, nor examined apart from her husband, nor asked if she executed it voluntarily, it is improper to show her knowledge of the deed prior and subsequent to her examination, and, that, in point of fact, she was not influenced by compulsion or improper means by her husband. The statutory requirements touching such examination and information by the notary are imperative, and must be complied with as a necessary pre-requisite to a valid conveyance of her property.—Wanneil v. Kem, 478.

See Divorce; Dower; Evidence, 2; Homestead; Judgment, 10; Practice, civil—Parties, 1.

I.

MENTINDICT; See Practice, Criminal.

INFANTS; See Judgments, 3.

INJUNCTION.

1. *Injunction—Fraud, unfair advantag gained by, in law court—Equity will interfere.*—Nothing is better settled than that, where, by mistake or fraud, a party has gained an unfair advantage in proceedings in a court of law, which must operate to make the court an instrument of injustice, as where default was taken after other arrangements had been made between counsel for the disposition of the case, courts of equity will interfere and restrain him from reaping the fruits of the advantage thus gained.—Bresnehan v. Price, assignee, 422.

See Streets, 1.

INN-KEEPER.

1. *Inn-keepers—Liability of for valuables stolen from transient guests—Safes—Notices, posting of, etc.*—An inn-keeper is liable for valuables stolen from the sleeping room of one who is a transient guest and not a permanent boarder, notwithstanding the fact that the hotel contains an iron safe designed for the bestowal of such articles, if notice thereof posted in the rooms is in small type and not in large or plain English type, as required by the statute. (Wagn. Stat., 710, § 1.)—Porter v. Gilkey, 235.

INSTRUCTIONS; See Practice, civil—Trials; Practice, Criminal, 7.

INSURANCE, FIRE.

1. *Fire Insurance Companies—Premium, receipt of by agent—Entry on books—Contract, what acts close.*—Where the agent of a fire insurance company accepts a policy sent him by it and charges himself on his agency books with the premium, the contract between him and the company is consummated although neither the premium nor a letter of acceptance is forwarded by him to his principal.—Lungstrass v. Germ. Ins. Co., 107.

2. *Fire insurance—Waiver of notice of loss by company—Averment as to, unnecessary.*—In suit against an insurance company for loss by fire, proof as to waiver of notice of loss may be made without any special averment of that fact in the pleading.—Schultz v. Merchant's Insu. Co., 331.

3. *Fire insurance—Application—Statement in as to tenants, not a warranty.*—The statement in an application for a policy of fire insurance, that the building to be insured was tenanted, is not a warranty. The extent to which such a representation would affect the risk is a question to be determined by the jury from all the facts of the case; whereas a warranty is to be established without regard to its effect on the risk.—Ib.

4. *Fire insurance—Suit on policy of—What allegations sufficient.*—In suit on a fire insurance policy, the petition need not specifically allege notice and proof of loss. A simple averment that plaintiff "duly fulfilled all the conditions of said policy on his part," is sufficient. (Wagn. Stat., p. 1020, § 42.)—Richardson v. North Mo. Ins. Co. of Macon, Mo., 413.

INSURANCE, LIFE.

1. *Life Insurance, suit against—Corporation—Cause of action accrues, when—Where suit may be begun.*—Under the statute authorizing suits to be brought against a corporation in the county "where the cause of action accrued," (Wagn. Stat., 294, § 28,) the cause of action against a Life Insurance Company accrues at the place of death, and suit may be commenced there notwithstanding that the contract of insurance may have been entered into in another county.—Rippstein v. St. L. Mut. Life Ins. Co., 86.

2. *Life Insurance Company, suit against—Formal proofs waived, how.*—In a suit on a life insurance policy, a defense charging death by *delirium tremens*, which allegation, if true, exempted the company from all liability, amounted to a waiver of the formal proofs required by the by-laws of the company.—Id.

INTEREST; See Bills and Notes, 2, 4, 5, 10; Usury.

INTERPLEA; See Attachment.

J.

JEOFAILS; see Practice, Civil—Parties, 1.

JUDGE; see Administration, 1.

JUDGMENT.

1. *Judgment—Fraud and irregularity.*—A party seeking to set aside a judgment for fraud or irregularity must take the burden of proof of establishing his charge.—Acock vs. Acock, 154.

2. *Judgment—Transcript of—Suit upon—Original writ—Mode of service, etc.*—In suit brought in this State, on a judgment given in the State of Virginia, the transcript is not rendered inadmissible by reason of the fact that the original writ of summons as shown thereon, was not under seal; and where service of that writ purported to have been made upon the wife of the defendant, at his residence, he not being found at his usual place of abode, etc., the transcript is not inadmissible under a fair construction of the laws of Virginia on account of its failure to show that she was a free white person, nor was it objectionable, as failing to show, that the writ was served at defendant's usual place of abode, or that service was made in the officer's bailiwick. It cannot be presumed against the judgment of a court of general jurisdiction, that service was made by an officer of the court outside of the county. At least, such cannot be presumed to be the case in a collateral proceeding.—State to use v. Williamson, 192.

3. *Res adjudicata judgment must be on merits.*—A former judgment to operate as *res adjudicata*, must be a judgment on the merits.—Verhein v. Schultz, 326.

4. *Judgment—Irregularity in, not void collaterally, when.*—Where suit was brought against several defendants, of whom a portion were minors, and judgment was rendered against the infants without their appearance by guardian or curator, or where a judgment was rendered, on notice of publication against non-resident defendants at the same term at which they were notified to appear, *held*, that in cases of that character although such judgments might be set aside for irregularity in direct proceedings for that purpose, they were not void, collaterally, as to parties brought within the jurisdiction of the court.—Bailey, v. McGinniss, 362.

5. *Sale of land after satisfaction of judgment.*—It is well established that if a judgment be satisfied, the power to sell under it ceases, and in case of sale the purchaser gets no title. (Durette v. Briggs, 47 Mo., 356.)—Durfee v. Moran, 374.

6. *Judgments of other States may be impeached for fraud.*—A judgment of a court of record of a sister State, where the parties appear or are duly summoned, imports absolute verity, and cannot be impeached at law. But in equity, judgments, whether foreign or domestic, may be declared void for fraud, in actions brought to enforce them in this State. And in suit brought on a foreign judgment obtained by fraud, that plea may be set up, and will constitute a complete bar to recovery.—Ward v. Quinlivin, 425.

7. *Judgment affirmed.*—Judgment affirmed because manifestly for the right party, although error appears in the record.—State to use v. Barada, 562.

8. *Judgment—Recitals in—Evidence—Notice.*—A recital in a judgment that the defendant has been "duly served with process," is conclusive against him on the question of notice. The judgment cannot be impeached by the introduction of other parts of the record which fail to show when or how the process was served.—Rumfelt v. O'Brien, 569.

9. *Judgment—Void for uncertainty as to parties.*—In a suit against two defendants, a judgment against "the defendant" is void.—Caldwell v. Stephens, 589.

10. *Judgment against married woman.*—A general judgment for damages and costs against a married woman is improper.—Id.

JUDGMENT, continued.

11. *Judgment—Appeal—Error of counsel.*—A judgment cannot be reversed because an attorney in reading the word, "defendant" in the minutes, mistakenly understood it to be intended for "plaintiff."—McGregor v. Leighton, 598.

See Ejectment, 4, 5, 6; Mechanic's Liens; Sheriff's Sales, 1.

JURISDICTION.

1. *Courts, co-ordinate—Conflict of authority as to custody of property under attachment or execution.*—In case of a conflict of two co-ordinate courts, as to the juriadiction over property, it is the universal rule, that the tribunal in which jurisdiction first attaches by the seizure and custody thereof under its process, must prevail.—Metzner v. Graham, 404.

See Attachment, 3; Judgment, 2, 3; Justices' Courts, 5, 6, 7; Mechanic's Lien, 1; Practice, civil, Trials, 3; Replevin, 1.

JURY.

1. *Jury—What facts influencing verdict may be shown.*—The rule is perfectly well settled, that jurymen cannot be allowed to disclose the fact of any partiality or misconduct which took place in the jury-room nor the motives which induced their verdict. But their affidavits showing that no disturbing influence was brought to bear upon them, and that they were not interfered or tampered with are properly received by the court.—State v. Underwood, 40.

2. *Practice, criminal—Separation of jury—Effect of.*—The separation of a jury in a criminal cause, will not vitiate the verdict, unless it further appear that they have been tampered with, or have been guilty of some improper conduct.—State v. Carlisle, 102.

See Condemnation of Land, 5; Ejectment, 1; Equity, 2; Fraud, 1; Practice, civil, Trials, 14.

JUSTICES' COURTS.

1. *Justices' courts—Formal judgment unnecessary in.*—In trials in justices' courts a verdict will be held as a judgment, and the entry of a formal judgment is not required.—Stemmons v. Carey, 222.

2. *Justices' courts, appeal from—Payment of costs not a pre-requisite—Constr. Stat.*—Payment of costs is not a pre-requisite to the right of appeal from a justice's court, where motion to set aside a default has been filed and overruled. The filing and overruling of such motion is the only *sine que non* to that right. (See 2 Wagn. Stat., 846-7, §§ 1, 2; also Beers vs. Atl. & Pac. R. R., 55 Mo., 292.) The statute of 1855 (R. C., 1855, 953, § 17; see also Wagn. Stat., 832, § 17) in no manner abridges the right of appeal. The intent of that law was merely to prevent a justice from prescribing any other conditions than payment of costs, for setting aside a default.—Palmer v. Kas. City, St. Joe & C. B. R., 250.

3. *Justice of Peace—Suit on lease made by partnership—Statement, what sufficient—Title of cause.*—A written lease from one firm to another, although executed in their partnership names, is a sufficient statement of the cause of action within the intent of the statute, in suit by the lessors against the lessees, before a justice of the peace. In such suit, the cause being entitled of the firm names is error, but not such as to work dismissal. The title might be amended at any time before final judgment in the Circuit Court. (See Wagn. Stat., 849, § 13.)—Moore & Co. v. Read Bros., 292.

4. *Limitations—Judgments before justices of peace in foreign States—Constr. Stat.*—Suits brought in this State upon judgments rendered in another State in justice's court, after the lapse of five years from the date of rendition, are barred by the statute of limitations. (Wagn. Stat., 917, 918, §§ 8, 9, 10 construed.) Humphreys vs. Lundy, (37 Mo., 320) and Sublett vs. Nelson, (38 Mo. 487), were cases of *scire facias* or proceedings analogous thereto, and were merely the continuation of proceedings already begun. They were not original and independent actions to which the statute can be pleaded.—Coomes, et al. v. Moore, 338

JUSTICES' COURTS, continued.

5. *Trespass—Common law and statutory trespass, united in one suit—Jurisdiction of justice, extent of—Power of court to treble damages.*—Where plaintiff's causes of action comprehend a common law trespass, for wrongfully entering his land, and also a trespass under the statute for cutting down and carrying away his timber; and the verdict is general concerning both trespasses, the damages cannot be trebled.

In such proceeding a justice would, under the statute concerning justices' courts (Wagn. Stat., 808-9, § 3), have jurisdiction to hear a case for single damages to the extent of fifty dollars; and under the trespass act (Wagn. Stat., 1345, § 1), suit being for statutory trespass only, the court may treble the verdict.—Shrewsbury v. Bawtlitz, 414.

6. *Justices of peace—Jurisdiction in trover.*—A justice of the peace has no jurisdiction for *trover* and *conversion* of an amount exceeding fifty dollars. (Wagn. Stat., 808, § 3.)—Spencer v. Vance, 427.

7. *Justices' Court—Jurisdiction—Execution—Exemption.*— A justice of the peace has no jurisdiction in a trial upon interrogatories and answers between the plaintiff in execution and a garnishee, to determine the rights of the defendant upon his claim to select and hold the garnished debt as exempt from execution.—State to use v. Barada, 562.

8. *Justices' courts—Appeal—Notice—Appearance.*—Where an appeal is taken from a justice of the peace on a day subsequent to that of the judgment, the appellant will not be excused for failure to notify the appellee by reason of irregular entries made by the clerk at the return term of the Circuit Court, when no appearance is entered by the appellee, and no record entry is made to that effect.—McGregor v. Leighton, 597.

See Mechanic's Lien, 1.

L.

LAND AND LAND TITLES.

1. *Register of lands—Official character of, how established.*—It is not necessary in order to establish the official character of the Register or Receiver of Lands of the State, that anything more be proven than that they acted in the offices which they assumed.—Wickersham v. Woodbeck, 59.

2. *Land Titles—Register of Lands—Receipt by, passes what title.*—The receipt of the Register and Receiver for the purchase money of land, is evidence that the State has passed at least its equitable title, although no patent has issued. Id.

3. *Land and land titles—Exchange of lands—Deed of trust—Vendor's lien, etc.*—A. owned a tract of land in the county, and B., a house and lot in the city, incumbered by a debt for $1,000, secured by deed of trust. They agreed to exchange, and did exchange property with each other, upon the express condition and agreement that upon exchanging titles the incumbrance on the property of B. should be removed, and that such removal should be received in part payment of the property of A., B. having obtained the title from A. by means of such promise, to remove the incumbrance. *Held*, 1st. That the debt which was secured by the deed of trust on the house and lot, would constitute until removed, a vendor's lien on the tract of land conveyed to B., notwithstanding that the deed from B. to A. contained covenants of warranty, for breach of which an action at law might be maintained. 2nd. That such lien is treated as a constructive or implied trust, and therefore not within the statute of frauds.—Pratt v. Clark, 189.

4. *Land containing spring of water—Dedication of.*—The first part of a certain paper bound the proprietors of a tract of land adjoining the town of Liberty, to allow the citizens of that place "the free privilege of drinking water," out of a spring embraced in the tract. The latter part reserves the special site about the spring from sale, for the benefit of the citizens; but the proprietors were allowed to make any use of the spring which would not "prevent the citizens of said town from using it."

LAND AND LAND TITLES, continued.

Held, that the proper intent of the instrument was to dedicate the spring to the citizens of Liberty, not merely for drinking purposes, but for any other use provided its capacity was not diminished for drinking purposes.—Corbin v. Dale, 297.

5. *Land and land titles—Quarter section corners, how ascertained in exterior sections bounded by township or range line—Regulations of U. S. Land Department—Rule as to interior sections, etc.*—Where the original monuments fixed by the United States for the corners bounding a tract of land can be found and identified, they are conclusive, and will govern without regard to courses and distances. But the regulations of the United States Land Department require that in exterior sections bounded on the north or west by range or township lines, where the quarter section corners cannot be found, the interior corner of the section shall be first found and established; from which exactly forty chains shall be measured along the line in the direction of the township or range line, and at that point the quarter section corner is to be placed; and this always leaves the excess or deficiency to the quarter directly on the township or range line. And it makes no difference whether the fraction contains more or less than the number of acres shown by the government field notes. And where the statute of this State conflicts with the regulations of the U. S. Land Department on this subject, the latter must govern.

In interior sections, where the original quarter section corners cannot be found or proved, they are to be established at a point equi-distant from the corresponding corners of the section.—Knight v. Elliott, 317.

6. *Will—Intention of testator must govern—Description of lands—What sufficient to pass title.*—In ejectment for certain land claimed under a will, it appeared that the instrument contained a schedule of the lands of the testator, some of which he described particularly, and others only as so many tracts in the State or a certain part of the State, without giving a description of the separate tracts; and an estimated value was placed upon the different lists. Among others was the following: "16 quarter sections of military bounty lands situated on the north side of the Missouri river, bought of Thomas Hawley." The will bequeathed to plaintiff's grantor "$3,000 worth of land to be valued by him according to the valuation contained in the list." The will further declared it to be the intention of the testator to dispose of all of his property. The executors, acting in supposed pursuance of the foregoing bequest, deeded to plaintiff's grantor the tract of land in controversy, which was shown to be the land of the testator and military bounty land, lying north of the Missouri, and in every way answered to the bounty land designated, except that it was conveyed to the testator by one Tower, and not by Hawley. *Held*, that the will should be so construed as, if possible, to effectuate the intention of the testator, and that the words, "bought of Thomas Hawley," should not be construed to restrict the other portions of the will, in which he declared his intention to bequeath his whole estate; and that as the land derived from Tower would otherwise remain undisposed of, although not particularly designated in the lists it would pass under operation of the will.—Gianes et al. v. Fender, 342.

7. *Sale of land after satisfaction of judgment.*—It is well established that if a judgment be satisfied, the power to sell under it ceases, and in case of sale, the purchaser gets no title. (Durette v. Briggs, 47 Mo., 356.)—Durfee v. Moran, 374.

8. *Land, sales of—Inadequacy of consideration—Equity will interfere, when.*—Although inadequacy of consideration is not of itself a distinct and independent principle of relief in equity, yet when the transaction discloses a state of affairs that shocks the moral sense or outrages the conscience, courts will interfere on slight grounds.—Id.

9. *Land sales—Combination to prevent bidding—Effect of.*—It is now the uniform doctrine that any combination, at public or private sales, having the effect of preventing competition in bidding, is against the policy of the law and avoids the sale.—Id.

LAND AND LAND TITLES, continued.

10. *Land and land titles—Claim founded on false field notes—Statute of limitations.*—Where one holds land up to a certain boundary as the true one, with the understanding however that he claims only to the extent of his paper title, the statute of limitations does not run in his favor, but where he claims absolutely and holds adversely to all others, although his claim proves to have been based upon a mistake touching the survey, the contrary rule prevails.—Major's Heirs v. Rice, 384.

11. *Land and land titles—Undisturbed possession—Estoppel.*—Where two adjoining proprietors recognize a certain dividing line as the true one, and with this understanding one of them with the knowledge and cognizance of the others erects dwellings and improvements up to this boundary, and is permitted for many years to maintain his possession, the adjacent owner will be estopped from afterwards disturbing his title.—Ib.

12. *Ancient deed—Execution—Proof as to—What sufficient.*—Where a deed was more than thirty years old and had been all the time in the possession of the grantee as a muniment of title; and no one had been in actual occupancy of the land, but the grantee had paid the taxes, and claimed the land under the deed, and the instrument seemed genuine, and the hand-writing of the attesting witness was proved; *Held,* that its execution as an ancient deed was sufficiently established.—Shaw v. Pershing, 416.

3. *Evidence—Loss of deed—Proof of—Secondary evidence, etc.*—Where a deed was attached to certain depositions, and the package duly enveloped sealed, directed and stamped, and placed in the mail, but failed to reach its destination, and was never heard of afterwards: *Held,* that the loss was sufficiently established to let in secondary evidence touching the conteets of the deed.—Id.

14. *Military bounty lands—Deeds, loss of—Presumption of, how raised—Copy of record over thirty years old—Admissibility of—Law touching, changed pending appeal—Constr. Stat.*—The loss of deeds executed outside of this State, affecting military bounty lands in Missouri will be presumed, so that secondary evidence of their contents may be admitted, if it appear that search has been made in the proper places and by the proper persons, and that they cannot be found after due diligence has been used in looking for them. Although it might be questionable whether a certified copy of the record—made more than thirty years before—of such a deed was admissible without proof of the execution of the original, under the law in force at the date of the trial below, (see Wagn. Stat., 595, §§ 35, 36,) yet being competent under the act of March 22d, 1873, the cause will not be sent back by the Supreme Court, on account of the error in admitting the copy. (See Totten vs. James, 55 Mo., 494.)—Hubbard v. Gilpin, 441.

15. *Tax deeds—Recitals as to advertisement of sale.*—Where a collector's deed merely recites that the advertisement for sale was made "according to law," the deed is void.—Id.

16. *Tax deed—Assessment in name of one having no record or apparent ownership.—Semble,* that an assessment of land under the law of 1855, (R. C. 1855, p. 1330, § 21,) in the name of the original patentee, who was not on the records the real owner, nor in point of fact the apparent owner, was a void assessment, and would invalidate a tax sale made under it.—Id.

17. *Ejectment—Labeaume survey and patent of* 1852 *prevailed over Lirette confirmation and survey of* 1826*—Brazeau reservation—Maguire vs. Tyler, referred to.*—In ejectment for certain land in St. Louis, plaintiff's claim was based originally on a confirmation made in 1810 to Labeaume, "according to the Soulard survey in 1799." The first survey of the tract did not include the land in dispute. But it was set aside and a new survey made retracing the Soulard survey, which embraced that tract, and on this new survey, a patent was issued to Labeaume in 1852. Defendant claimed, by virtue of a confirmation to Lirette of "one by forty arpents" made in 1816 by act of Congress, under which the land in controversy was located by a United States survey in 1826.

LAND AND LAND TITLES, continued.

Held, that the Labeaume confirmation being of a definite tract of land, took immediate effect, and that the subsequent proceedings by survey and patent related back to the proceedings before the board in 1870 and prevailed against the confirmation to Lirette. The case of Magwire vs. Tyler originated in a dispute about locality, and in that case the titles of Brazeau & Labeaume were synchoronous, and originated before the same board, and the survey locating the Brazeau tract within the Labeaume confirmation, was in that case, held correct, but that decision did not determine the last Labeame survey and patent issued thereon in 1852, to be invalid, except as to the Brazeau reservation. —Tyler v. Wells, 472.

18. *Conveyances—Execution—Acknowledgment—Delivery—Presumption*—A deed is not generally executed until it is acknowledged, and till that takes place there is no presumption of delivery.—Fontaine v. Boatmen's Savings Inst., 552.

19. *Deeds—Consideration clause—Recital may be contradicted.*—The consideration clause in a deed has only the character and force of a receipt, and is always open to explanation or contradiction.—Id.

20. *Public highway—Title to land.*—The owner of land joining on a public highway, street or alley, owns the fee to the center thereof, subject to an easement in the public.—Hannibal Bridge Co. v. Schaubanher, 582.

See Administration 1; Condemnation of land; Ejectment; Homestead; Lease; Limitation, 1, 2, 3; Trusts and Trustees, 1.

LANDLORD AND TENANT.

1. *Landlord and tenant act—Proceeding under—Petition may be amended, how.*—In a suit by attachment under the landlord and tenant act, plaintiff cannot, by amendment, change his cause of action so as to maintain the attachment against a plea in abatement. But if defendant appears to the action and files an answer in bar to the merits, the petition may be amended in the same manner and for like reasons as in other actions.—Fordyce v. Hathorn, 120.

2. *Landlord and tenant—Rent in kind—Place of payment.*—Where rent is payable in kind and no place of payment is stipulated, a tender upon the premises is sufficient. And the tenant holds the property so set apart as bailee at the risk and expense of the landlord.—Id.

3. *Justice of Peace—Suit on lease made by partnership—Statement, what sufficient—Title of cause.*—A written lease from one firm to another, although executed in their partnership names, is a sufficient statement of the cause of action within the intent of the statute in suit by the lessors against the lessees, before a justice of the peace. In such suits, the cause being entitled of the firm names is error, but not such as to work dismissal. The title might be amended at any time before final judgment in the Circuit Court. (Wagn. Stat., 849, § 13.)—Rohrbough, Moore, & Co. v. Reed Bros., 292.

LEASE.

1. *Lease—Subscribing witness—Proof of handwriting, etc.*—In suit by the maker against the other party to a lease, proof of the handwriting of a subscribing witness, then dead, and of the identity of the defendant with the person named in the instrument, is sufficient to render the deed admissible in evidence.—Gallagher v. Delargy, 29.

See Landlord and Tenant, 3.

LIEN, MECHANICS'; See Mechanic's Lien.

LIENS, VENDORS'; See Vendor's Lien.

LICENSE.

1. *License, revocation of—Power coupled with an interest, etc.*—A license is an authority or power, and marked with the incidents that usually accompany powers among which is the right of revocation at any time, at the will or pleasure of the person creating the power or granting the license. But this doctrine ceases to apply when the power is coupled with an interest, or is necessary to the possession or enjoyment of a right or title arising from the act or contract of the person who creates the power.—Baker v. C., R. I. & Pac. R. R. Co., 265.

LIMITATION.

1. *Limitations, statute of—Land vested in the State.*—Land vested in the State of Missouri while the act of 1857, (Sess. Acts 1856-7, p. 78, § 9,) was in force was subject to the bar of the statute of limitations.—Wickersham v. Woodbeck, 59.

2. *Limitations, statute of—Land vested in the State.*—Land vested in the State of Missouri while the act of 1857 (Sess. Acts, 1856-7, p. 78, § 9) was in force, was subject to the bar of the statute of limitations; and in an action by one holding under the State to recover such land, it might be pleaded, although suit was brought subsequent to the act of 1865. (Gen. Stat., 1865, p. 746, § 7.) Burch v. Winston, 62.

3. *Limitations—Statute of, in suit for title to land.*—In order to divest the title to land out of one owner and vest it in another, by reason of his adverse possession, that possession must be actual, visible, notorious and hostile, continuous and uninterrupted, under a claim of title, for a period of ten years next preceding the commencement of the suit.—Dalby v. Snuffer, 294.

4. *Limitations—Judgment before justices of peace in foreign States—Constr. Stat.*—Suits brought in this State upon judgments rendered in another State in justice's court, after the lapse of five years from the date of rendition, are barred by the statute of limitations. (Wagn. Stat., 917, 918, §§ 8, 9, 10 construed. Humphreys vs. Lundy, (37 Mo., 320) and Sublette vs. Nelson, (38 Mo., 487,) were cases of *scire facias* or proceedings analogous thereto, and were merely the continuation of proceedings already begun. They were not original and independent actions to which the statute can be pleaded.—Coomes v. Moore, 338.

5. *Administrator's estate—General and special statutes of limitation.*—In the absence of any notice of the grant of letters of administration, the general statute of limitation applies, and begins to run in favor of the estate from the date of the letters.

Where notice of the grant of letters has been given, the special statute of three years takes effect, and the failure of such notice does away with that special bar, but not with the general limitation law.—Ayers, admr. v. Donnell, exr., 396.

6. *Non-suit—Action brought after in U. S. Court—Statute of limitations*—The statute requiring suit to be brought within one year after non-suits, etc., (Wagn. Stat., 919, § 19) does not prevent plaintiff, where otherwise entitled to his remedy in that tribunal, from bringing his action in the U. S. Court, and thus escaping the bar of the statute.

And such a non-suit may be voluntary, and need not be one brought about by an adverse ruling of court.—Shaw v. Pershing, 416.

See Administration, 6; Land and Land Titles, 10, 11.

LIS PENDENS; See Practice, civil, 5.

LOST DEED; See Evidence, 9; Land and Land Titles, 14.

M.

MALICE; See Criminal Law, 1.

MANDAMUS; See Railroads, 1.

MECHANIC'S LIEN.

1. *Mechanics' liens—Jurisdiction of circuit and justices' courts as to amounts.*—Under the constitution (Art. VI, § 13) and the statutes (Wagn. Stat., p. 430, § 2) the Circuit Courts of this state have no jurisdiction to try a mechanic's lien suit, where the amount involved is less than fifty dollars.

Under the act of 1872 (Adj. Sess. Acts 1872, p. 44), justices of the peace have jurisdiction over such cases; and jurisdiction is not taken from them or conferred upon the Circuit Courts by reason of the fact that justices' courts have no process by which non-resident defendants in such proceedings can be reached.—Stamps v. Bridwell, 22.

MECHANIC'S LIEN, continued.

2. *Mechanic's lien—Account—Items of—Time of filing.*—If the several items of an account form parts of one contract, and the last accrues within the statutory limit before the time of filing the lien, it will attach as to all.—Schmeiding v. Ewing, , 78.

3. *Mechanic's lien—No personal judgment against the owner of the building.*—In a suit to enforce a mechanic's lien, no personal judgment can be obtained against the owner of the building, who was not a party to the contract for the work or materials.—Id.

4 *Mechanic's lien—Time of filing—Clerical error may be corrected, when.*—Although the indorsement made by the clerk upon the written account required by the statute to perfect a mechanic's lien, will be *prima facie* evidence as to the date of filing, it will be nevertheless competent to show that he erred in this respect; and if the fact clearly appear, it is within the province of the court before whom the suit is tried to make the correction.—Grubbs, et al. v. Cones, et al., 83.

5. *Mechanic's lien—Admissions by builder touching account of material man no evidence against the owner, etc.*—The admissions by a builder acknowledging the correctness of an account rendered for material furnished in building a house, are evidence in a suit thereon against the builder, but not in a suit brought against the owner of the building under the mechanic's lien law.—Philibert v. Schmidt, 211.

6. *Practice, civil—Trials—Instructions—Mechanic's Lien.*—An instruction in a suit on a mechanic's lien, that "if they find the account as stated in the petition or any part of it due plaintiff, then plaintiff has a lien on said building and lot, for the amount found due," is erroneous because it ignores the question whether the plaintiff has taken the steps necessary to secure his lien.—Hall v. Johnson, 521.

MISTAKE; See Fraud, 2.

MORTGAGES AND DEEDS OF TRUST.

1. *Mortgages and deeds of trust—Chattel mortgages—Mortgagee entitled to possession after breach—Extension of time on debt.*—The mortgagee of personal property is entitled to possession of the mortgaged property after breach of condition, and an extension of time on the debt would make no difference with this right.—Bowens v. Benson, 26.

2. *Deed of trust—Sale under—Proceeds—Payment of taxes.*—A trustee holding the naked legal title to land, cannot, on a sale of the property, use part of the purchase money to satisfy taxes, or prior incumbrances, unless he is empowered thereto in the instrument creating the trust. In all such cases the purchaser takes the land subject to the incumbrances. *A fortiori* taxes cannot be so satisfied where they constitute a simple debt against the owner, and not a lien on the property.—Schmidt v. Smith, 135.

3. *Mortgage—Equity of redemption—Purchase of, by mortgagee.*—A. and B. jointly bought an equity of redemption in a tract of wild land, upon which, A. had a mortgage or a deed of trust. Subsequently A. foreclosed his mortgage and requested B. to join him in the sale under the trust, but B. refused. A. bought at a price greatly below the sum secured to him by the deed of trust. Years after A. died, his administrator sold the land to a stranger who put improvements on it worth $5,000. B. died also, and his heirs or representatives asked to be considered as tenants in common with these purchasers, on payment of one-half of A.'s bid, not one-half of his debt; *held*, that there was no equity in the bill, without an offer to pay one-half of A.'s debt; *held* further that the refusal of B. to join in the purchase at the trustee's sale—the death of B. and of A.—the sale by A.'s administrator—the purchase by a stranger, and a large investment of money in improvements, would be strong, if not conclusive evidence of an abandonment of the co-tenancy by B., and estop him and his heirs after a long lapse of time.—Potter v. Herring, 184.

MORTGAGES AND DEEDS OF TRUST, continued.

4. *Mortgages not under seal, when recorded impart notice.*—Under a proper construction of the several sections of the statute touching conveyances, (Wagn. Stat., p. 273, § 7; p. 277, §§ 24, 25, 26,) the registration of a mortgage, although having no seal or scrawl attached, nevertheless imparts notice. The registration law was intended to embrace not only legal conveyances, but all instruments in writing affecting real estate in law or equity.—McClurg v. Phillips, 214.

5. *Equity—Sale under deed of trust—Parol statements of purchaser, as to intention in purchasing—Resulting trust.*—Where the beneficiary in a deed of trust was apparently a *bona fide* purchaser, at the sale by the trustee, of an absolute title to real estate, the fact that the maker of the deed was a brother-in-law, and the fact that the purchaser casually said to him afterward, that he only wished by the purchase to secure his debt, and when that was paid designed to re-convey the property, were held not to be such circumstances as of themselves to render him a trustee for the maker of the deed. Such a remark was no declaration of trust, which a Court of Equity could enforce had it been reduced to writing. And being parol it was a nullity under the statute of frauds. Nor would such declaration vest such equitable interest in the grantor as to subject it to his creditors.—Mansur v. Willard, 347.

6. *Mortgage, chattel—Sale of mortgaged stock by mortgagor, etc.—Statute of Frauds.*—Where a mortgagor of chattels, by the terms of the instrument is not permitted to sell or dispose of them for his own use, but is required to apply the proceeds to the discharge of the debt secured by the mortgage, the deed is not void as being for the use of the mortgagor. (Brooks vs. Wimer, 20 Mo., 503; Stanley vs. Bunce, 27 Mo., 269; Billingsley vs. Bunce, 28 Mo., 547, referred to).—Metzner v. Graham, 404.

7. *Chattel mortgage—Possession before condition broken.*—The law is well settled that although a trustee or mortgagee of personal property is, after default made or condition broken, entitled to its possession, and considered in law as its owner, yet prior to that time it is equally certain that no such right of either possession or ownership exists.—Barnett v. Timberlake, 499.

See Land and Land Titles, 3; Conveyance, 2.

MURDER; See Criminal Law, 1, 2, 3.

N.

NEGLIGENCE; see Agency, 1, 2; Fraudulent Misrepresentations.

NEW TRIAL; see Practice, civil—New Trial.

NON-SUIT; see Limitation, 5; Practice, civil—Appeal, 3.

NOTARY PUBLIC.

1. *Notary Public—Certificate—Failure to mention seal—Copy of certificate, etc.*—A notary's certificate is not rendered invalid by reason of the mere fact that it purports to be executed under his "hand and official signature," and that his notarial seal is not mentioned therein, where the seal is attached to the certificate. And in such case, a copy taken from the recorder need not have the impress of the original seal; that may be indicated by a scrawl.—Dale, et al. v. Wright, 110.

NOTICE; see Administration, 6; Attachment, 1, 2, 3; Court, County, 2; Innkeeper, 1; Judgment, 2, 3; Justices' Courts, 8; Mortgages and Deeds of Trust, 5; Practice, civil, 5; Publication; Sheriff's Sales, 3; Venue, 2.

O.

OFFICERS; see Constable; Corporation, 3; Corporations, Municipal, 2; Court, County, 1; Register of Lands; Sheriff.

P.

PARTNERSHIP.

1. *Partnership, what essential thereto.*—To constitute a partnership, there must be an agreement between the parties that they will, from a certain day or time share the profits and be responsible for the losses, and carry on the business for their common benefit; and there must be an entering upon or conducting or doing business under such agreement, or some business preparatory thereto, to make them or either of them liable to third parties as partners.—Lucas v. Cole, 143.

2. *Justice of peace—Suit on lease made by partnership—Statement, what sufficient—Title of cause.*—A written lease from one firm to another, although executed in their partnership names, is a sufficient statement of the cause of action within the intent of the statute, in suit by the lessors against the lessees, before a justice of the peace. In such suit, the cause being entitled of the firm names is error, but not such as to work dismissal. The title might be amended at any time before final judgment in the Circuit Court. (See Wagn. Stat., 849, § 13.)—Rohrbourg, Moore & Co. v. Reed Bros., 292.

3. *Partnership—Note given outgoing partner for assets—Suit on in action at law, when proper.*—Where one of two co-partners buys the notes and accounts of the firm at their face value, and gives the co-partner his note for the amount with the understanding that where the notes and accounts prove worthless, a rebate *pro tanto* should be made on the purchase note, *held*, that in suit on the note in an action at law, defendant might, where these assets prove valueless, set up the facts to that extent as a defense to the note. No resort would be necessary in the first instance to a bill in equity for the purpose of settling the partnership. (See Russell v. Grimes, 46 Mo., 410.)—Bethel v. Franklin, 466.

4. *Equity—Partnership—Fraud—Misrepresentations or concealment between partners—Pleading—Sufficiency—Relief—Vigilance.*—Where one member of a firm who had the entire management of the partnership, without the knowledge or consent of his co-partner used the money, assets and credit of the concern in outside speculations, and appropriated the benefits to himself individually, and subsequently rendered to his co-partner a false balance sheet, purporting to correctly exhibit the true condition of the firm affairs, but which in fact did not mention or allude to the outside operations, and assured his co-partner that this statement was correct, and on the faith of this statement and his representations his partner was induced to convey to him all his interest in the concern, and to execute a bill of sale therefor, which though not mentioning the profits of the said outside operations, was in form sufficiently broad to cover them, *Held:*

1st. That a petition setting forth the above facts and concluding with a prayer for a re-opening of the settlement and a prayer for general relief, stated a cause of action; and the prayer for general relief authorized any relief consistent with the facts alleged.

2nd. That it was no excuse or defense that the co-partner might have discovered the wrong, and prevented its accomplishment, had he exercised watchfulness. Lack of vigilance only serves as a defense where the party being apprised of, slumbers upon his rights.—Pomeroy v. Benton, 531.

5. *Partnership—Outside ventures by one partner, with partnership funds.*—Outside of any stipulations in the partnership articles, good faith should restrain one partner from embarking the funds or credit of the firm outside of their legitimate scope, and for his own advantage; and if such ventures are made by one partner, he cannot appropriate the profits to himself, but must account for them to the partnership.—Id.

6. *Partnership—Agency—Responsibility between partners.*—Every partner is the agent of his co-partner, and the same rules and tests are applied to the conduct of partners, as are ordinarily applicable to that of trustees.—Id.

PAUPER.

1. *Support of the poor—Funeral expenses—County not liable for.*—The legislature never intended, by § 6 of the act for the support of the poor, (Wagn. Stat., p. 997–8) that the county should pay the funeral expenses of a man who had sufficient means to bury him at the time of his death, notwithstanding the fact that the administration law might vest all his property in his widow.—Handlin v. Morgan Co., 114.

2. *Support of the poor—Burial Expenses.*—One who voluntarily buries a poor person, has no legal demand against the county therefor.—Id.

PERJURY.

1. *Perjury—Evidence, what necessary in addition to accusing witness.*—To convict of perjury the oath of the opposing witness must be corroborated by material and independent testimony. And an instruction, ignoring this point, and directing a conviction in case the jury are satisfied, etc., of guilt, is manifest error; but it is also error to instruct that such additional evidence must be tantamount to another witness.—State v. Head, 252.

PHELPS COUNTY; see County Courts, 1.

POSSESSION; see Ejectment, 4, 5, 6; Land and Land Titles, 11; Mortgages and Deeds of Trust, 1, 9.

POWERS.

1. *License, revocation of—Power coupled with an interest, etc.*—A license is an authority or power, and marked with the incidents that usually accompany powers, among which is the right of revocation at any time, at the will or pleasure of the person creating the power or granting the license. But this rule ceases to apply when the power is coupled with an interest, or is necessary to the possession or enjoyment of a right or title arising from the act or contract of the person who creates the power.—Baker v. C. R. I. & P. R. R., 265.

2. *Powers, limitations upon.*—Limitations upon powers to be exercised by corporations and by individuals, are to be interpreted alike in both cases by the terms in which they are expressed, and without reference to whether the powers be inherent or conferred.—Farmer's and Trader's Bank v. Harrison, 503.

PRACTICE, CIVIL.

1. *Scire facias—Suit must be revived when—Construction of statute.*—The true intent and meaning of § 6 of the act touching the abatement and revival of suit, is that the suit must be revived at or before the third term, after the term at which the suggestion of death is made. In making the computation the term at which the death is suggested, must be excluded.—Gallagher v. Delargy, 29.

2. *Practice, civil—Jurisdiction waived, how.*—An appearance to the merits and the setting up of a defense in bar to the action, waives a plea to the jurisdiction.—Rippstein v. St. Louis Mut. Life Ins. Co., 86.

3. *Practice, civil—Insufficient pleading—Motion in arrest, etc.*—Where enough can be gleaned from a petition to show that plaintiff has a cause of action, a motion in arrest, on the score of insufficient statement, will be overruled.—Corpenny v. City of Sedalia, 88.

4. *Practice, civil—Constructive service, not shown to be made at usual place of abode gives no jurisdiction.*—Where the sheriff's return shows that a copy of the petition and writ were left with defendant's wife, but fails to show that it was left at his usual place of abode, such service confers no jurisdiction on the court, and judgment and sheriff's sale and deed of land based thereon are absolutely void in ejectment suit by a purchaser at execution sale.

Where personal judgment is sought to be rendered on constructive service, the essentials of the statute ought to be substantially complied with.—Hewitt v. Weatherby, 276.

5. *Lis pendens applies only to those having notice, etc.*—The doctrine of *lis pendens* only applies when parties to a suit have been notified of it. There is no *lis pendens* as to strangers until process is served or there is a voluntary appearance of the parties to it.—Bailey v. McGinness, 362.

See Venue.

PRACTICE, CIVIL—ACTION.

1. *Scire facias—Suit must be revived when—Construction of statute.*—The true intent and meaning of § 6 of the act touching the abatement and revival of suits, is that the suit must be revived at or before the third term after the term at which the suggestion of death is made. In making the computation the term at which the death is suggested must be excluded.—Gallagher v. Delargy, 29.

2. *Life Insurance, suit against—Corporations—Cause of action accrues, where—Where suit may be begun.*—Under the statute authorizing suits to be brought against a corporation in the county "where the cause of action accrued." (Wagn. Stat., 294, § 28.) the cause of action against a Life Insurance Company accrues at the place of death, and suit may be commenced there notwithstanding that the contract of insurance may have been entered into in another county.—Rippstein, v. St. L. Mut. Life Ins. Co., 86.

3. *Life Insurance Company, suit against—Formal proofs waived, how.*—In a suit on a life insurance policy, a defense charging death by *delirium tremens*, which allegation, if true, exempted the company from all liability, amounted to a waiver of the formal proofs required by the by-laws of the company.—Id.

4. *Actions—Trover of stock sent South during the war.*—In suit for the value of certain stock, where it appeared that plaintiff had sent the same from Missouri into Texas after the President's proclamation of non-intercourse of August 16th, 1861, and that defendant had there converted it to his own use; *held*, that these facts would not bar plaintiff's right of recovery. The plaintiff's act in sending the stock through the lines authorized its appropriation by the general government but not by a private citizen.—Charles v. McCune, 166.

5. *Evidence—Contents of lost record—Nature of action to prove.*—The general rule is, that if a record is lost or destroyed, its contents may be proved like those of any other instrument. And the party may proceed by his common law action, without resorting to the statutory remedy.—Parry v. Walser, Adm'r, 169.

6. *Practice, civil—Ejectment—Special verdict.*—A suit in ejectment for a certain tract of land without claim for further relief is not one wherein special issues of fact may be submitted to the jury. (Wagn. Stat., 1040–1, §§ 11, 12, 13; 1042, §§ 20, 22.)—Majors' Heirs v. Rice, 384.

See Damages, 2; Ejectment; Equity; Landlord and Tenant; Mandamus; Replevin; Trespass; Trover; Vendor's Lien, 1.

PRACTICE, CIVIL—APPEAL.

1. *Judgment for costs not final.*—A judgment for costs is not a final judgment from which an appeal will lie. (Boggess v. Cox, 48 Mo., 278.)—Dale v. Wright, 110.

2. *Justices' courts, appeal from—Payment of costs not a pre-requisite—Constr. Stat.*—Payment of costs is not a pre-requisite to the right of appeal from a justices' court, where motion to set aside a default has been filed and overruled. The filing and overruling of such motion is the only *sine qua non* to that right. (2 Wagn. Stat., 846–7, §§ 1, 2; also Beers vs. Atl. & Pac. R. R., 55 Mo., 292.) The statute of 1855 (R. C., 1855, 953, § 17; see also Wagn. Stat., 832, § 17) in no manner abridges the right of appeal. The intent of that law was merely to prevent a justice from prescribing any other condition than payment of costs, for setting aside a default.—Palmer v. Kas. C., St. Jo. & Council Bluffs R. R. Co., 249.

3. *Res adjudicata, judgment must be on merits.*—A former judgment to operate as *res adjudicata*, must be a judgment on the merits.—Verhein v. Schultz, 326.

4. *Non-suit, voluntary—Appeal will not lie.*—Appeal will not lie to set aside a voluntary non-suit.—Koger v. Hays, adm'r, 329.

See Justices' Courts, 8; Practice, Supreme Court, 2; Railroads, 4.

PRACTICE, CIVIL—NEW TRIAL.

1. *Practice, civil—Motion for new trial—Points not embraced in, disregarded in Supreme Court.*—Points not embodied in a motion for a new trial will be disregarded in the Supreme Court.—Acock v. Acock, 154.

PRACTEIC, CIVIL—PARTIES.

1. *Practice, civil—Suit brought by husband to use of wife—Error, how corrected.* The supreme court will not reverse a cause simply on the ground that the suit was brought in the name of the husband to the use of his wife instead of in the name of the husband alone; such error may be corrected by the trial court after judgment, or by the supreme Court, (see Wagn. Stat. 1034, § 6, and 1037, § 20).—Cruchon v. Brown, 38.

See Damages, 2.

PRACTICE, CIVIL—PLEADING.

1. *Practice, civil—Insufficient pleading—Motion in arrest, etc.*—Where enough can be gleaned from a petition to show that plaintiff has a cause of action, a motion in arrest on the score of insufficient statement, will be overruled.—Corpenny v. City of Sedalia, 88.

2. *Practice, civil—Defenses in abatement waived, when.*—Where matters in abatement and bar are contained in the same answer, the matters in abatement are waived by setting up the defenses in bar.—Fordyce v. Hathorn, 120.

3. *Landlord and tenant act—Proceeding under—Petition may be amended, how.*—In a suit by attachment under the landlord and tenant act, plaintiff cannot, by amendment, change his cause of action so as to maintain the attachment against a plea in abatement. But if defendant appears to the action and files an answer in bar to the merits, the petition may be amended in the same manner and for like reasons as in other actions.—Id.

4. *Practice civil—Pleadings—Variance.*—In suit by the "International Insurance Company, of New York," on the bond given to the company by one of its agents, the recital in the bond, of plaintiff's name, as the "International Insurance Company of the City and State of New York," was held an immaterial variance.—International Ins. Co. v. Davenport, 289.

5. *Fire insurance—Waiver of notice of loss by company—Averment as to, unnecessary.*—In suit against an insurance company for loss by fire, proof as to waiver of notice of loss, may be made without any special averment of that fact in the pleading.—Schultz v. M. Ins. Co., 331.

6. *Fire insurance—Suit on policy of—What allegations sufficient.*—In suit on a fire insurance policy, the petition need not specifically allege notice and proof of loss. A simple averment that plaintiff "duly fulfilled all the conditions of said policy on his part," is sufficient. (Wagn. Stat., p. 1020, § 42.)—Richardson v. N. M. Ins. Co., 413.

7. *Practice, civil—Pleading—Evidence—Note—Denial of execution—Fraud may be shown.*—Under a plea denying the execution of a note, defendant may prove that his signature was procured by fraud.

Generally where an instrument is void *ab initio* and not merely voidable, the plea of *non est factum* is proper. And evidence which shows the paper to be void is admissible under that plea.—Corby Ex'r v. Weddle, 452.

8. *Practice, civil—Pleading—Petition—Sufficiency of allegations of—Objections, when must be taken.*—Under our code (2 Wagn. Stat., 1012, § 1; 1015, § 10), if a petition, however inartificially drawn, do but state a cause of action and no objections are taken to the formal sufficiency of the allegations either by demurrer or answer, the defendant is deemed to have waived all such objections.—Pomeroy v. Benton, 531.

9. *Practice, civil—Pleading—Plaintiff's character as executor, sufficiency of allegations of.*—When in a petition plaintiffs styled themselves the executors of A., and stated that the note sued on was made to their testator, averred his death and brought into court and made profert of the letters of administration: *held*, that although there was no direct averment of plaintiffs' appointment as executors, yet that fact was necessarily inferrable from the other facts stated, and the petition was not so defective as to be demurrable on that account.—Bird, Exr. v. Cotton, 568.

10. *Demurrer sustained, effect of—Suit still pending.*—When a demurrer to a petition is sustained with leave given to amend, the suit is still pending until other and final action. Either party may take depositions without waiting for further pleading.—*Ex parte*, James E. Munford, 603.

PRACTICE, CIVIL—PLEADING, continued.

11. *Taking depositions—State of pleading.*—The taking of depositions, under the statute, has no necessary reference to the state of the pleadings at the time of the taking. It is a provision against contingencies, for the possible condition of the cause at the time of trial. It is not essential that the notary be acquainted with the issues, or that there be in fact any issues; provided, only, that the cause has been regularly instituted and is not finally disposed of.—Id..

See Ejectment, 5, 6; Justices' Courts, 3; Partnership, 4.

PRACTICE, CIVIL—TRIALS.

1. *Practice, civil—Allegata and probata—Variance, what not sufficient to invalidate verdict.*—In suit for the value of certain chattels where the petition charged a sale, whereas the evidence showed merely an agreement to return the same or corresponding articles, and a subsequent admission of indebtedness and promise to pay it; *held*, that such variance would not vitiate the verdict in the absence of proof that defendant was surprised or injured thereby. (See Wagn. Stat., 1033-4, §§ 1, 2.)—Wells v. Sharp, 56.

2. *Practice, civil—Variance—What remedy in case of.*—Where the variance between pleading and proof is material, the proper remedy is an affidavit filed with the trial court, setting forth the facts and an order directing an amendment upon terms.—Id.

3. *Practice, civil—Jurisdiction waived, how.*—An appearance to the merits and the setting up of a defense in bar to the action, waives a plea to the jurisdiction.—Rippstein v. St. L., M. L. Ins. Co., 86.

4. *Venue, change of—Application for—Proof not necessary, when.*—Where an application for change of venue is made after answer filed, on the ground that the cause for such change arose or became known to deponent after the filing, if the application complies with the statute, (Wagn. Stat., 1355-6, § 2) as to its recitals and verifications, it is sufficient to establish a *prima facie* right to the order. The applicant is not compelled to follow the statute literally, and establish by evidence *aliunde*, the facts sworn to.—Corpenny v. City of Sedalia, 88.

5. *Practice, civil—Instructions.*—Instructions which are not based upon facts in the case, and are not calculated to mislead, although correct as abstract propositions of law, should be refused.—State v. Bailey, 131.

6. *Practice, civil—Instructions.*—An instruction not based on evidence should be refused.—Musick v. A. & P. R. R. Co., 134.

7. *Practice, civil—Instructions—Commenting on testimony.*—An instruction commenting upon particular portions of testimony, to the exclusion of others, although correct *pro tanto*, is calculated to mislead the jury, and should be refused.—Jones v. Jones, 138.

8. *Practice, civil—Non-production of evidence caused by an intimation from the court.*—It is no sufficient reason for the non-introduction of testimony, that in the progress of the trial the court gave an intimation to the party in default that the ultimate decision might be in his favor.—Smith v. Funk, 239.

9. *Practice, civil—Instructions calculated to mislead, etc.*—An instruction having no application to the case and calculated to mislead the jury, should be refused.—Grigsby v. Fullerton, 309.

10. *Practice, civil—Evidence—Verdict.*—In a civil law case the supreme court will not interfere with the verdict of a jury on a question of conflicting testimony.—Schultz v. M. Ins. Co., 331.

11. *Practice, civil—Instructions in chancery suits.*—Where an answer sets up equitable defenses and the case is tried by the Court sitting as Chancellor, little regard will be paid by the Supreme Court to instructions.—Durfee v. Moran, 374.

12. *Practice, civil—Ejectment—Special verdict.*—A suit in ejectment for a certain tract of land without claim for further relief is not one wherein special issues of fact may be submitted to the jury. (Wagn. Stat., 1040-1, §§ 11, 12, 13; 1042, §§ 20, 22.)—Majors' Heirs v. Rice, 384.

PRACTICE, CIVIL—TRIALS, continued.

13. *Non-suit—Action brought after in U. S. court—Statute of limitations.*—The statute requiring suit to be brought within one year after non-suit, etc., (Wagn. Stat., 919, § 19) does not prevent plaintiff, where otherwise entitled to his remedy in that tribunal, from bringing his action in the United States court, and thus escaping the bar of the statute.

And such a non-suit may be voluntary, and need not be one brought about by an adverse ruling of court.—Shaw v. Pershing, 416.

14. *Practice, civil—Evidence—Juries.*—In civil cases at law juries are the sole judges of the preponderance of testimony.—Wannell v. Kem, 478.

15. *Practice, civil—Trials—Instructions—Mechanic's Lien.*—An instruction in a suit on a mechanics' lien, that "if they find the account as stated in the petition or any part of it due plaintiff, then plaintiff has a lien on said building and lot for the amount found due," is erroneous because it ignores the question whether the plaintiff has taken the steps necessary to secure its lien.—Hall v. Johnson, 521.

16. *Practice, civil—Witnesses, credibility of—Jury.*—The credibility of witnesses must be passed upon by the jury.—Durkee v. Chambers, 575.

17. *Practice, civil—Instruction assuming facts will not warrant reversal, when.*—An instruction which assumes as true, a fact in issue, is wrong; but where the evidence is clear and conclusive as to such fact, and there is no contradictory testimony, the giving of such instruction will not warrant a reversal of the cause.—Caldwell v. Stephens, 589.

See Ejectment, 1; Fraud, 1; Jury, 1.

PRACTICE, CRIMINAL; see Criminal Law.

1. *Practice, criminal—Change of venue.*—Notwithstanding the provisions of the statute, (Wagn. Stat., p. 1098, § 27,) a second change of venue may be granted in a criminal cause when the judge has been of counsel therein. (See State vs Gates, 20 Mo., 400.)—State v. Underwood, 40.

2. *Practice, criminal—Co-defendant, when may be first tried.*—Where facts and circumstances are shown which render it apparent that no verdict of "guilty" can be obtained against a co-defendant in a criminal prosecution, it is the practice to allow him to be first tried so that he may be a competent witness. Where the evidence against him is slight, the court may, in its discretion, submit his case at the close of the testimony for the prosecution.—Id.

3. *Practice, criminal—Presence of prisoner, when unnecessary.*—Every person indicted for a felony must be present during the trial, (Wagn. Stat. 1103, § 15); but the mere fact that a motion affecting his case is taken up and discussed in his absence, where no final action is had thereon, is not such error as will warrant a reversal.—Id.

4. *Practice, criminal—Indictment for robbery in first degree—Conviction of robbery in second degree—Autrefois acquit.*—A prisoner was indicted for robbery in the first degree, and under the indictment might have been convicted of grand larceny. Being convicted of robbery in the second degree, the verdict was without his consent set aside. *Held,* 1st, that a conviction of robbery in the second degree operated as an acquittal of the higher offense charged; 2nd, that the prisoner could not be retried under the same indictment, and found guilty of grand larceny. (See State v. Brannon, 55 Mo., 63.)—State v. Pitts, 85.

5. *Practice, criminal—Separation of jury—Effect of.*—The separation of a jury in a criminal cause, will not vitiate the verdict, unless it further appear that they have been tampered with, or have been guilty of some improper conduct.—State v. Carlisle, 102.

6. *Practice, criminal—Abuse of trust—Indictment—Allegation of scienter.*—An indictment against a County Court justice, under the act of 1872, (Adj. Sess. Acts, 1872, p. 59) for an abuse of public trust in voting for a certain appropriation, which charged that "well knowing that the appropriation and payment were illegal," etc., * * "he knowingly and feloniously did vote for said illegal appropriation," etc., is insufficient. The further averment would be necessary to the effect that he was actuated by some dishonest or corrupt motive. (See State vs. Hein, 50 Mo., 362.)—State v. Pinger, 243.

PRACTICE, CRIMINAL, continued.

7. *Practice, criminal—Instruction—Reasonable doubt, etc.*—It is error to instruct a jury to acquit in case of a "reasonable doubt," without adding an explanation of the phrase, such as *e. g.* that such doubt ought to be a substantial doubt touching the prisoner's guilt, and not a mere possibility of his innocence. (State vs. Nueslein, 25 Mo., 111.)—State v. Heed, 252.

See Criminal Law; Revenue, 3; Venue, 6.

PRACTICE, SUPREME COURT.

1. *Practice, civil—Supreme Court—Case reversed on question of fact, when.*—The Supreme Court will reverse on a question of fact, where such fact is material to plaintiff's right to recover, and is wholly without proof.—Schmeidling v. Ewing, 78.

2. *Practice, Supreme Court—Appeal from Caldwell Common Pleas, etc.*—Appeal does not lie directly to the Supreme Court from the Court of Common Pleas of Caldwell county. (Smith v. Guerant, 55 Mo., 584, affirmed.)—Wilson v. Reed, 238.

3. *Practice, Supreme Court—Care in bringing up record.*—Parties who bring cases to the Supreme Court should see to it that the record is so made up as to raise the points on which they rely.—Inhabitants of Brookfield v. Carter, 315.

4. *Practice, Supreme Court—Preponderance of testimony.*—In civil law cases the Supreme Court will not decide as to preponderance of testimony.—Kiley v. Forsee, 390.

5. *Practice, Supreme Court—Failure to assign error, etc.*—Where appellant fails to file assignment of errors, statement or brief, as required by law, the appeal will be dismissed.—Birch v. Hoyt, 412.

6. *Practice, civil—Failure to save exceptions, etc.*—In a civil law case where no exceptions are saved to any ruling of court, and no point of law is brought up by instructions, motion in arrest, or for new trial, or by bill of exceptions, the judgment of the court below will be affirmed.—Davis v. Ware, 460.

7. *Practice, Supreme Court—Absence of bill of exceptions.*—No bill of exceptions appearing in the record, the Supreme Court cannot review the action of the court below, upon motion and affidavits to set aside the judgment.—Clarkson v. Stanchfield, 573.

See Equity, 3; Fraud, 1; Practice, Civil—New Trials, 1; Practice, Civil—Trials, 10.

PRESUMPTION; See Attachment, 2; Evidence.

PUBLICATION; See Attachment, 1, 2, 3.

R.

RAILROADS.

1. *Railroads—County Courts—Subscription of stock—Mandamus to compel will not lie after completion of road, etc.*—Under the Act of March 23rd, 1868, (Adj. Sess. Acts 1868, p. 92) mandamus would not lie on behalf of a railroad company or tax-payers of a township to compel the County Court to subscribe stock to the railroad after the same had been fully completed through the township. The company could have no legal interest in the subscription until actually made and accepted by it; and so far as the county was concerned, the authority to make the subscription ceased as soon as the road was completed through the township. It was not contemplated by the above act, that townships should be allowed to take stock in roads already built.—State, v. Co. Ct., Bates Co., 70.

2. *Railroads—Timbered lands, fencing of.*—The statute concerning railroad corporations (Wagn. Stat., 310, § 43) contemplates, that the company shall fence in the line of its road adjoining all inclosed lands whether timbered or otherwise. (Slattery vs. St. L., K. C. & N. R. R. Co., 55 Mo., 362.)—Saunders v. St. L., K. C., and N. R. R., 117.

RAILROADS, continued.

8. Under Wagn. Stat., § 43, p. 310, a railroad company is not responsible for stock killed by the cars, etc., when such killing takes place at a point on their road where it is not fenced, and where it does not pass through or along inclosed or cultivated fields, or uninclosed prairie lands, unless actual negligence be proven —Musick v. A. & P. R. R., 134.

4. *Railroads—Atl. & Pac. R. R.—Taxation—Act of Dec. 25, 1852, a contract.*—The twelfth section of the act of Dec. 25th, 1852, and its acceptance by the Pacific Railroad, were a contract between the State and that company binding the state, and for two years after its completion exempted that road from taxation, no dividend being declared in the meantime; and the same principle governs as to taxation of what is denominated as the South West Branch Railroad. (See decision in Pacific R. R. Co.v. Maguire, Wall. U. S. Sup. Ct. R.) —South Pac. R. R. v. Laclede Co., 147.

5. *Railroads—Timbered lands—Inclosure of road along.*—Under the statute touching Railroad Companies, (Wagn. Stat., 310, § 43) they are bound to fence the line of their roads adjoining inclosed lands, although timbered.—Sparr v. St. L., K. C. & N. R. R., 152.

6. *Railroads—Action for damages in name of owner—Constr. Stat.*—Suit against a railroad company, to recover double damages for injuries to stock, need not be brought in the name of the State, under § 42 of the Railroad Act, (Wagn. Stat., 310) but may be instituted in the name of the owner, under § 43 p. 310-11.—Id.

7. *Railroad—Grant of right of way on conditions—Failure to comply with—Permission to occupy—License, revocation of—Estoppel—Ejectment.*—The owner of certain land consented to its occupation for the construction of a railroad, and executed a conveyance granting right of way over the same, conditioned that the company should, within a given time after its completion, place fences and cattle guards adjoining the grantor's land, as required by law. The deed was delivered to the agent of the company, with the understanding, however, that it was not to be delivered to the company till they complied with its terms. The corporation went forward without objection from the grantor, and completed the road, and made expensive and permanent improvements upon it, but failed to erect the fences and cattle guards. The deed was never delivered to the company, and the grantor brought suit in ejectment. *Held,* that the grantor might have insisted upon the payment of damages, as a condition precedent to building of the road, or upon the erection of fences, etc. in the first instance; but that the conditions named in the grant referred to were subseqnent and not precedent; that the entry under the license was lawful; and that, by reason of his conduct in allowing the company to build the road and make the improvements, he was estopped from afterward treating his permission as a nullity, and maintaining ejectment.

The remedies of the grantor in such cases are ample. He may sue for specific performance, or for damages, or build fences and cattle guards and compel the company to pay for them.—Baker v. Rock Island & Pac. R. R. Co., 265.

8. *Railroads—Inaction of owner of land not held as acquiescence, when.*—Mere silence and inaction, for the time being, on the part of a land owner, when informed that a railroad company are constructing their track over his property, will not be construed into acquiescence so as to estop him from his action of ejectment.—Walker v. Chicago, R. I. & Pac. R. R. Co. 275.

9. *Railroad company—Occupation of land without authority—Ejectment.*—Where a railroad company builds its road over land to which they have acquired no requisite title by condemnation, or conveyance or license, ejectment will lie—Ib.

10. *Railroads—Contractors—Teamsters, etc.—Construction of Statute.*—The statute making railroads amenable to laborers for work done under the employment of contractors (Wagn. Stat., 302, § 10), does not include persons who furnish wagons and drivers, to haul or deliver material in the construction of the road. (See on this subject Sess. Acts 1873, p. 61.)—Grooves v. K. C., St. Joe. & Council Bluffs R. R. Co., 304.

RAILROADS, continued.

11. *Railroads—Drainage of surface water—Must be accomplished with reasonable care, etc.*—While a railroad company has a right to drain surface water from its road bed, so as to protect the same for continued and profitable use, the work must be so done as to occasion no unnecessary inconvenience or damage to the adjoining proprietor. And the latter may recover for injuries produced by mere negligence without proving malicious intent.—McCormick v. St. Jos. & Council Bluffs R. R. Co., 433.

12. *Railroads—Damage to adjoining land—What contemplated by estimate of damages assessed in condemning.*—Damages to adjoining land such as would naturally occur where a railroad is constructed and used in a lawful and ordinary manner, are presumed to be included in the estimate of damages assessed in condemning the road bed, and cannot afterward be recovered in a suit against the railroad. But otherwise, where the injuries are the result of tort or negligence on the part of the company.—Id.

13. *Railroads—Fencing of field where highway intervenes.*—The spirit of the statute, (Wagn. Stat., 310-11, § 43) contemplates that railroad corporations shall fence the line of their road along an inclosed field, although a public highway abuts upon the road and intervenes between it and the field.—Robinson v. C. & A. R. R., 494.

14. *Damages—Railroads, suits against—Proceedings for condemnation—Appeal bond in.*—In an action of damages against a railroad company for appropriating plaintiff's land, it is no defense to the suit that defendant had commenced proceedings for condemnation of the property, and had appealed to the Supreme Court from the report of the commissioner. The appeal bond would not be held as an indemnity for plaintiff's damages.—Ring v. Miss. River Bridge Co., 496.

15. *Railroads—Condemnation—Failure of company to pay damages—Trespass—Road liable for action of, when.*—The owner of land taken for railroad purposes may demand payment of his damages as a condition precedent to the appropriation. But if he waives this right, and permits the company to proceed in the construction of its work, he may nevertheless have his action at any time against the road for the injury done to his property. Where the road fails to deposit with the clerk the amount assessed as damages, (Wagn. Stat., 327, § 3) but appeals from the report of the commissioners, any further interference with the property, till the question of damages is determined, would be trespass and render the company liable to an action therefor.—Id.

See Eminent Domain, 1; Revenue, 2.

RECORD; See Evidence, 5, 6; Land and Land Titles, 14; Mortgages and Deeds of Trust, 4; Practice, Supreme Court, 3.

REGISTER OF LANDS; See Land and Land Titles, 1, 2.

REPLEVIN.

1. *Replevin—Motion to dismiss.*—Where property was seized under a writ of replevin, issued from the Cape Girardeau Court of Common Pleas, and the Judge of the Circuit Court for that county had issued his warrant in vacation, directing the property to be delivered to defendant, and the property was so delivered in pursuance of such order; *Held*, that a motion to dismiss the action of replevin, on the ground of such warrant and delivery, and because the process issued by the Circuit Judge ousted the jurisdiction of the Court of Common Pleas, was improperly sustained. If there was any valid defense it should have been taken by answer, but could not be reached by a motion to dismiss. —Fientge v. Priest, 515.

RES ADJUDICATA; See Judgments, 4.

REVENUE.

1. *Revenue—Assessment of sub-divisions—Constr. Stat.*—The proper meaning of § 49 of the Revenue Act, (Wagn. Stat., 1167.) is that all sub-divisions of a section belonging to the same person should be reported as one tract although such sub-divisions may not be contiguous.—Sparks v. Clark, Auditor, 58.

REVENUE, continued.

2. *Revenue—County Board of equalization—Railroad assessments—Entries on assessment book by deputy county clerk of previous years—Assessment.*—An entry correcting the books of the county assessor, is not objectionable merely by reason of the fact that the entry, instead of being made by the county clerk, was made by his deputy, nor by reason of the fact that the order of the County Board of Equalization, directing the assessment to be placed on the assessor's books, was entered on the journal of its proceedings after the adjournment and dissolution of the Board, nor by reason of the fact that the assessment, having been omitted by mistake, was entered the year subsequent without notice of the time of the entry.—Pac. R. R. Co. v. County Clerk of Franklin Co., 223.

3. *Revenue—Indictment for false oath as to amount of taxable property—Averments, what sufficient.*—In an indictment under the revenue law for making a false oath as to the amount of defendant's taxable property where the complaint alleged in substance that defendant made the required statement and signed and subscribed it and desired the assessor to swear him to the same, and that he was then and there duly sworn and took his corporal oath before the officer, and the indictment after minutely setting out all the facts, proceeds to state that defendant "falsely, corruptly, etc., and with intent to defraud in and by said written oath did depose and swear." *Held*, that the indictment sufficiently set forth that the oath was taken to a written or printed list as required by the statute. (Wagn. Stat., 1163-5, § 28, 30 and 34.)—State v. Foulks, 461.

See Taxes.

ROBBERY; See Practice, Criminal, 4.

S.

SALES.

1. *Vendors—Misrepresentations as to property sold—Negligence of vendee in making inquiries, may be set up by vendor, when—Estoppel.*—In suit upon a promissory note given for the purchase of certain stock, it appeared that defendant purchased the same from the president of the company, who represented that the stock was at par, that the business was of great value, and that the corporation was solvent, all which representations proved untrue. It further appeared that defendant, before his purchase, had ample opportunities to learn the true state of affairs. But, *held*, that defendant had a right to presume that the vendor, as president of the company, was fully informed as to its financial condition, and the failure of the vendee to make inquiries relating thereto in other quarters was no proof of negligence such as would estop him from pleading the false representations as a bar to recovery on the note.—Wannell v. Kem, 478.

2. *Vendor—Fraudulent misrepresentations—What sufficient to defeat claim for purchase money.*—Fraudulent misrepresentations in order to defeat a recovery of purchase money for the property sold, must be made with intent to deceive and must be solely and exclusively relied upon by the vendee in making his purchase.—Id.

See Administration, 1; Frauds, Statute of; Fraudulent Misrepresentations, 1; Judgments, 5; Land and Land Titles, 9; Mortgages and Deeds of Trust; Sheriffs' Sales; Vendor's Lien.

SCHOOLS.

1 *Schools—Selection of site for sub-district school house.*—The directors of a school sub-district have no power of their own mere will or discretion to select a site for a school, but the selection must be made at a meeting of the voters called for that purpose. (Wagn. Stat., Ed. 1872, p. 1244, § 12.)—Seibert v. Botts, 430.

SCIRE FACIAS; see Practice, Civil, Actions, 1.

SEAL; see Mortgages and Deeds of Trust, 5; Notary Public, 1.

SEPARATE ESTATE; see Husband and Wife, 2.

SERVICE; see Judgment, 2, 3, 6; Practice, civil, 3.

SHERIFF.

1. *Sheriff—Failure of to collect on execution—Recovery against for—What remedy against—Execution defendant.*—A sheriff who, through neglect, has failed to collect money on an execution, and in consequence of such failure has been compelled to pay the debt to the plaintiff in the execution, cannot afterward in an ordinary action recover such amount from the defendant in the execution. —Walker v. Bradbury, 66.

2. *Sheriff—Seizure of goods attached by, on execution issued from another court —Duty of sheriff—Mode of settling claims.*—A sheriff who holds property in his possession under a writ of attachment, and awaiting judgment in the attachment suit, cannot seize and sell the same property on a special execution, issued by another court of co-ordinate jurisdiction, in a proceeding commenced subsequent to the levy of the attachment.

The goods attached are in the custody of the law, until disposed of by a final judgment, and meanwhile, are beyond seizure by any execution or attachment. In such case the sheriff should return the execution to the court from whence it issued, with the indorsement thereon that the property is in his possession, under a writ from a different court, and the plaintiff in the execution may then, under the statute (Wagn. Stat., p. 191, § 50,) be transferred to the court in which the attachment originated, and the conflicting claims be there settled.—Metzner v. Graham, 404.

SHERIFF'S SALE.

1. *Sheriff's sales—Notice—Time of sale—Innocent purchaser.*—Real estate sold on execution, must be sold at the time and place announced in the notice given for such sale, and the sale cannot be postponed to another day by order of court, without a new notice; and when a sale is so postponed, the purchaser is not protected by his good faith, if the want of notice or defect of notice appears on the face of the sheriff's deed.—Ladd v. Shippie, 523.

SHERIFF'S DEED.

1. *Sheriff's deed—Recitals as to judgment in favor of administrator.*—The record entry of a judgment recited its rendition in favor of A. and B. The execution recited judgment of same date for same sum and against same defendant, but in behalf of A. & B., as administrators, and alleged that their letters had been revoked, and that execution had been ordered in the name of the public administrator, and the substitution was shown by the court records. *Held*, that the record taken together sufficiently showed that the judgment was in favor of A. & B., in their administrative capacity, and that a sheriff's need reciting such judgment, was not *quod hoc* defective.–Acock v. Stuart,150.

2 *Sheriff's deed—Cannot be attacked collaterally, when.*—In ejectment for land bought at sheriff's sale, mere irregularities which do not render the deed absolutely void, cannot be inquired into.—Hewitt v. Weatherby, 276.

See Practice, Civil, 3; Sheriff's Sales.

SPECIAL TAXES; see Revenue; Streets.

STATEMENT; see Justices' Courts, 3.

STATUTE, CONSTRUCTION OF.

1. *Statute, omission of—Intention of legislature.*—The Supreme Court cannot declare that the omission of a statute was unintentional, where nothing in regard to the intention of the legislature is expressed or necessarily implied. Such declaration would be in the nature of judicial legislation.—State v. Clark, 25.

See ADMINISTRATION, 3, (Wagn. Stat. 95, § 11).
BANKS AND BANKING, 5, (Wagn. Stat. 783, § 5).
CONDEMNATION OF LAND, 5, (Sess. Acts, 1873, p. 24, § 4).
CONSTABLE, 2, (Wagn. Stat. 844–5, §§ 19, 20, 23).
CONTRACTS, 2, (Wagn. Stat. 783, § 5).
CORPORATIONS, 4, (Wagn. Stat. 335–6, § 12).
COUNTY BONDS, 1 (Adj. Sess. Acts, 1870, p. 18, § 12).
CRIMINAL LAW, 4, (Wagn. Stat. 490, § 15).
DAMAGES, 2, (Wagn. Stat. 310, § 42).
DIVORCE, 2, (Wagn. Stat. 541, § 14).
DOWER, (See DIVORCE *Supra.*)
EJECTMENT, 1, (Wagn. Stat. 1040–1, §§ 11 12, 13; 1042, §§ 20, 22).
EVIDENCE, 1, (Wagn. Stat., 1372–3, § 5); 5, (Wagn. Stat. 1078, § 25).
FENCES, 1, (Wagn. Stat. 633; *Id.* 707, § 87); 2, (Wagn. Stat. 633, § 1).
HOMESTEAD, 1, (Wagn. Stat. 698, §§ 7, 8, 9); 2, (Wagn. Stat. 698, § 5).
HUSBAND AND WIFE, 2, (Wagn. Stat. 273, § 2).
INN KEEPERS, 1, (Wagn. Stat, 710, § 1).
INSURANCE, FIRE, 4, (Wagn. Stat. 1020, § 42).
INSURANCE, LIFE, 1, (Wagn. Stat. 294, § 28).
JUSTICES' COURTS, 2, (Wagn. Stat. 846–7, §§ 1, 2; *Id.* 832, § 17; R. C. 1855, p. 953, § 17); 3, (Wagn. Stat. 849, § 13); 4, (Wagn. Stat. 917–18, §§ 8, 9, 10); 5, 6, (Wagn. Stat. 808, § 3).
LAND AND LAND TITLES, 14, (Wagn. Stat. 595, §§ 35, 36; Act March 22, 1873); 16, (R. C. 1855, p. 1330, § 21).
LANDLORD AND TENANT, 3, (Wagn. Stat. 849, § 13).
LIMITATION, 1, 2, (Sess. Acts, 1856–7, p. 78, § 9); 2, (Gen. Stat. 1865, p. 746, § 7); 4, (Wagn. Stat. 917, 918, §§ 8, 9, 10); 6, Wagn. Stat. 919, § 19).
MECHANIC'S LIEN, 1, (Const., Art. VI, § 13; Wagn. Stat. 430, § 2; Adj. Sess. Acts, 1872, p. 44).
MORTGAGES AND DEEDS OF TRUST, 4 (Wagn. Stat. 273, § 7; 277, §§ 24, 25, 26).
PAUPER, 1, (Wagn. Stat., 997–8, § 6).
PRACTICE, CIVIL—ACTIONS, 1, (Wagn. Stat., 1030, § 6;) 2, (Wagn. Stat., 294, § 28;) 6, (Wagn. Stat., 1040–1, §§ 11, 12, 13; 1042, §§ 20, 22).
PRACTICE, CIVIL—APPEAL, 2, (Wagn. Stat., 846–7, §§ 1, 2; *Id.* 832, § 17; R. C., 1855, 953, § 17).
PRACTICE, CIVIL—PARTIES, 1, (Wagn. Stat., 1034, § 6; 1037, § 20).
PRACTICE, CIVIL—PLEADING, 6, (Wagn. Stat., 1020, § 42;) 8, (Wagn. Stat., 1012, § 1; 1015, § 10).
PRACTICE, CIVIL—TRIALS, 1, (Wagn. Stat., 1033–4, §§ 1, 2;) 4, (Wagn. Stat., 1355–6, § 2;) 12, (Wagn. Stat., 1040–1, §§ 11, 12, 13; 1042, §§ 20, 22).
PRACTICE, CRIMINAL, 1, (Wagn. Stat., 1098 § 27;) 3, (Wagn. Stat., 1103 § 15;) 6, (Adj. Sess. Acts, 1872, p. 59).
RAILROADS, 1, (Adj. Sess. Acts, 1868, p. 92;) 2, 3, 5, 6, 13, (Wagn. Stat., 310, §§ 42, 43;) 4, (Act Dec. 25, 1852;) 10, (Wagn. Stat., 302, § 10; Sess. Acts, 1873, p. 61;) 15, (Wagn. Stat., 327, § 3).
REVENUE, 1, (Wagn. Stat., 1167, § 49;) 3, (Wagn. Stat., 1163–5, §§ 28, 30, 34).
SCHOOLS, 1, (Wagn. Stat., (1872,) 1244, § 12).
SHERIFF, 2, (Wagn. Stat., 191, § 50).
TRESPASS, 1, (Wagn. Stat., 808–9, § 3; 1345, § 1).
TROVER, 1, (Wagn. Stat., 808, § 3).
VENUE, 1, (Wagn. Stat., 1098, § 27;) 2, (Wagn. Stat., 1356, § 4; 1010, § 25;) 5, (Wagn. Stat., 1355–6, § 2).
WITNESSES, 1, (Wagn. Stat., 1372–3, § 5).

STATUTE OF FRAUD; see Fraud, Statute of.

STOCK, KILLING OF; see Railroads.

STREETS.

1. *Streets—Opening of—Non-payment for land taken for, what remedy proper.*—Where city authorities condemn a lot and are preparing the same for a public street, but fail to make payment for the land, injunction restraining the city from using it, until paid for, is improper. The remedy, if the owner claims the sale to be void, is ejectment; if valid, suit for the purchase money.—Hammerslough v. City of Kansas, 219.

See Corporations, Municipal, 1; Damages, 1; Land and Land Titles, 20.

SUBSCRIPTION.

1. *Contract—Subscription, alteration of—Ratification.*—Where the amount of an original subscription was altered by a third party, a subsequent ratification, would be equivalent to a previous authorization of the change.—Workman vs Campbell, 53.

2. *Subscription—Alteration—Consent—Burden of proof.*—In a suit on a contract of subscription, where the defense was an alteration without defendant's consent, of the amount subscribed, the *onus* would rest on plaintiff to prove that defendant placed opposite his name, or consented to have placed, the sum sued for.—Id.

See Railroads, 1.

SURETIES.

1. *Promissory notes—Extension—Surety, when held.*—An extension of the time for a definite period was granted to the principal maker of a note without the consent of the surety, and the contract for extension was indorsed on the back of the note. Surety was released.—German Sav. Ass. v. Helmrick, 100.

2. *Promissory notes—Extension—Payment of interest in advance—Discharge of sureties.*—A promise of extension upon a note, in order to discharge a surety thereon, must be such as will prevent the holder from bringing an action against the principal; and the taking of interest in advance will not constitute such a promise.—Hosea v. Rowley, 357.

3. *Promissory note—Extension—Discharge.*—An extension granted to the principal debtor in a promissory note, in consideration of usurious interest paid in advance, will not operate a release of the surety.—Farmers' & Traders' Bank v. Harrison, 503.

See Bills and Notes, 3, 4; Guardian and Ward, 1.

T.

TAXES; See Husband and Wife, 2; Land and Land Titles, 12, 16; Mortgages and Deeds of Trust, 2; Railroads, 4; Revenue

TAX DEED; See Conveyances, 3.

TENDER; See Landlord and Tenant, 2.

TRANSCRIPT; See Judgment, 2, 6; Justices' Courts, 4.

TRESPASS.

1. *Trespass—Common law and statutory trespass united in one suit—Jurisdiction of justice, extent of—Power of court to treble damages*—Where plaintiff's causes of action comprehend a common law trespass, for wrongfully entering his land, and also a trespass under the statute for cutting down and carrying away his timber: and the verdict in general concerning both trespasses, the damages cannot be trebled.

In such proceeding a justice would, under the statute concerning justices' courts (Wagn. Stat., 808-9, § 3), have jurisdiction to hear a case for single damages, to the extent of fifty dollars; and under the trespass act (Wagn. Stat., 1345, § 1), suit being for statutory trespass only, the court may treble the verdict.—Shrewsbury v. Bawtlitz, 414.

See Justices' Courts, 5; Railroads, 15.

TROVER.

1. *Justice of the peace—Jurisdiction in trover.*—A justice of the peace has no jurisdiction for trover and conversion of an amount exceeding fifty dollars. (Wagn. Stat., 808, § 3.)—Spencer v. Vance, 427.

2. *Trover—Measure of damages.*—In trover the measure of damages is the market value of the property at the time of conversion, with interest up to the time of trial, and not the price paid for it. This rule is subject to qualification where the value of the property is fluctuating.—Id.

3. *Actions—Trover of stock sent south during the war.*—In suit for the value of certain stock, where it appeared that plaintiff had sent the same from Missouri into Texas, after the President's proclamation of non-intercourse of August 16th, 1861, and that defendant had there converted it to his own use; *held,* that these facts would not bar plaintiff's right of recovery. The plaintiff's act in sending the stock through the lines, authorized its appropriation by the general government but not by a private citizen.—Charles v. McCune, 166.

See Practice, civil,; Actions, 4.

TRUSTS AND TRUSTEES; See Equity, 1; Mortgages and Deeds of Trust; Practice, Criminal, 6; Vendor's Lien, 2, 3.

U.

USURY.

1. *Usury—Criminality—Illegality.*—Usury is not now considered a crime, so as to render invalid every contract into which it enters. The contract is illegal only to the extent of the forbidden excess of interest.—F. & T. Bank v. Harrison, 503.

See Bills and Notes, 4, 10; Corporations, 7, 8.

V.

VARIANCE; See Attachment, 1; Practice, civil-Pleading, 7; Practice, civil-Trials, 1, 2.

VENUE.

1. *Practice, criminal—Change of venue.*—Notwithstanding the provisions of the statute, (Wagn. Stat., p. 1098, § 27,) a second change of venue may be granted in a criminal cause when the judge has been of counsel therein. (See State vs. Gates, 20 Mo., 400.)—State v. Underwood, 40.

2. *Venue, change of—Notice, what necessary.*—The "reasonable notice" of application for change of venue, required by the statute, (Wagn. Stat., 1356, § 4) is not necessarily the five days' notice prescribed by the General Statute touching service of notices, (Wagn. Stat., 1010, § 25.) The latter section was intended to furnish nothing more than a general rule for the guidance of the trial courts, and was never intended to be of universal application, or absolute and inflexible in its character.

Thus, where pending the impaneling of a jury, the court adjourned over Sunday, an application for change of venue, filed on the opening of the court Monday morning, was held in that case neither deficient in point of time, nor by reason of failure of written notice.—Corpenny v. City of Sedalia, 88.

3. *Venue, change of—Affidavit sworn to by city attorney, when proper.*—The affidavit attached to the petition of a municipality for change of venue, is properly sworn to by the city attorney rather than by the mayor.—Id.

4. *Venue, change of—Application for—Proof not necessary, when.*—Where an application for change of venue is made after answer filed, on the ground that the cause for such change arose or became known to deponent after the filing, if the application complies with the statute, (Wagn. Stat., 1355-6, § 2) as to its recitals and verifications, it is sufficient to establish a *prima facie* right to the order. The applicant is not compelled to follow the statute literally, and establish by evidence *aliunde,* the facts sworn to.—Id.

VENUE, continued.

5. *Venue, change of—Time of filing application for.*—The provision of the legislature requiring the motion for a change of venue to be filed on or before the filing of defendant's answer to the merits, is imperative. (Wagn. Stat., p. 1355, §§ 2, 3.)—Jenkins v. Hill, 122.

VENDOR'S LIEN.

1. *Land and land titles—Exchange of lands—Deed of trust—Vendor's lien, etc.*—A. owned a tract of land in the country, and B., a house and lot in the city incumbered by a debt for $1,000, secured by deed of trust. They agreed to exchange, and did exchange property with each other, upon the express condition and agreement that upon exchanging titles the incumbrance on the property of B. should be removed, and that such removal should be received in part payment of the property of A.,-B. having obtained the title from A. by means of such promise, to remove the incumbrance. *Held*, 1st. That the debt which was secured by the deed of trust on the house and lot, would constitute, until removed, a vendor's lien on the tract of land conveyed to B., notwithstanding that the deed from B. to A. contained covenants of warranty, for breach of which an action at law might be maintained. 2d. That such lien is treated as a constructive or implied trust, and therefore not within the statute of frauds.—Pratt v. Clark, 189.

2. *Vendor's lien enforced, notwithstanding law remedy, etc.*—The right of a vendor to enforce his lien may well, and frequently does, exist contemporaneously with a right of recovery at law, and the jurisdiction always exercised by courts of equity in cases of trust will not be ousted by the fact that courts of law could afford an apparently adequate relief.—Id.

VERDICT; See Ejectment, 1, 5, 6; Fraud, 1; Judgment; Jury, 1; Justice's Court, 1.

W.

WAGES; See Garnishment, 1.

WAIVER; See Insurance, Fire, 2, 4; Insurance, Life, 2; Practice, civil, 2; Practice, civil—Pleading, 5, 9.

WAR; See Practice, civil—Action, 4; Trover, 3.

WARRANTY; See Insurance, Fire, 3.

WILLS.

1. *Wills—Copies taken from courts of Probate, when admissible.*—Where Probate Courts under special statutes have superseded County Courts in the transaction of probate business, copies of wills taken from the records of the former courts are admissible in evidence, although the general statute of wills still requires the County Court clerk to record them.—Hubbard v. Gilpin, 442.

See Land and Land Titles, 6.

WITNESSES.

1. *Witnesses—Testimony of wife when substantially a party—Const. stat.*—Section 5 of the Witness Act (Wagn. Stat., 1372-3,) does not preclude the wife from testifying where she is a substantial party to the suit.—Harriman v. Stowe, 93.

2. *Agent of deceased person may testify as to transactions subsequent to the death.*—A transaction had by the agent of a deceased person, since the death of his principal, may be shown in evidence, but in such case the agent himself must testify.—Leeper, admr. v. McGuire, 360.

See Evidence, 3, 11, 12.